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Supreme Court

OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index 11141—1967

FREDERICK WALZ,

Plaintiff-Appellant,

—against—

TAX COMMISSION OF THE CITY OF NEW YORK,

Defendant-Respondent.

Statement Under Rule 5531 CPLR

1. The index number in the court below is 11141/1967.

2. The full names of the original parties are: Frederick Walz, plaintiff and Tax Commission of the City of New York, defendant. There has been no change in the parties.

3. The action was commenced in the Supreme Court, New York County.

4. The action was commenced June 15, 1967 by service of the summons and verified complaint. Defendant's verified answer was served on June 28, 1967.

5. The action is to enjoin the defendant from allowing religious organizations to be exempt from payment of the real estate tax assessed by defendant.

6. The appeal is taken from an order granting summary judgment dismissing the complaint and denying plaintiff's motion for summary judgment, entered March 5, 1968 and from the judgment entered thereon March 22, 1968.

7. The appendix method is not being used.

Summons

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. .....

Plaintiff designates New York County as the place of trial.

The basis of the venue is location of defendant's office.

Plaintiff resides at 60 East 42nd Street, County of New York.

FREDERICK WALZ,

Plaintiff,

—against—

TAX COMMISSION OF THE CITY OF NEW YORK,

Defendant.

To the above named Defendant

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure

to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York City, June 14, 1967.

FREDERICK WALZ
Attorney pro se,
Office and Post Office Address
60 East 42nd Street
New York City 10017

Complaint

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

Plaintiff alleges:

First: That plaintiff is a citizen of the United States of America and sole owner in fee of real property located in the City and State of New York, designated as Lot 210, Section 1, Block 198, on the Tax Map of the County of Richmond.

Second: That defendant, at all times hereinafter mentioned, was and still is duly appointed, qualified and acting pursuant to authority of the City of New York, a municipal corporation created by act of the Legislature of the State of New York, and charged with the duty of assessing all real property situated within the City of New York lawfully subject to taxation.

Third: That defendant has assessed the real property mentioned in Paragraph First hereof for the tax year 1967-1968, commencing July 1, 1967 and the said action became final on March 15, 1967.

Fourth: That under the laws of the State of New York real property is taxable unless specifically exempted by law.

Fifth: That at all times herein mentioned defendant was required by law to inquire, investigate and determine which, if any, real property in the City of New York should be exempted from taxation.

Sixth: Upon information and belief, defendant granted tax exemptions to all religious corporations, as contemplated in law, for all real property owned by them and used for religious purposes, pursuant to Article 16 of the constitution of the State of New York, for the tax year commencing July 1, 1967.

Seventh: Upon information and belief that the action of the defendant, as set forth in the preceding paragraph, was illegal because in violation of the first and fourteenth amendments of the constitution of the United States of America.

Eighth: Plaintiff is a Christian and not a member of any religious organization as referred to herein, rejecting them as hostile, that the aforesaid tax exemption constitutes an involuntary payment by plaintiff to the aforementioned religious organizations, in violation of plaintiff's right of religious freedom, guaranteed to him under the constitution of the United States of America and that said action by defendant constitutes confiscation of plaintiff's property without due process of law, in violation of the provisions of the constitution of the United States of America.

Ninth: That plaintiff has no adequate remedy at law.

WHEREFORE plaintiff prays judgment that the tax exemption granted to religious organizations as set forth herein be declared illegal;

that defendant be restrained perpetually from granting such tax exemption;

that defendant be restrained, as above prayed, during the pendency of this action and

granting plaintiff such other and further relief as may be just and equitable; with costs.

FREDERICK WALZ,
Attorney pro se,
60 East 42nd Street,
New York City 10017

(Verified.)

Answer

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

The defendant, the Tax Commission of The City of New York, by its attorney, J. Lee Rankin, Corporation Counsel, for its answer to the complaint herein, respectfully alleges:

I. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph "First" thereof.

II. Denies each and every allegation contained in paragraph "Fifth" of the complaint, and alleges that the Tax Commission of the City of New York ascertained all of the facts required by law necessary to determine the taxable status of the real property and what real property in the City of New York should be exempt from taxation.

III. Denies each and every allegation contained in paragraph "Sixth" of the complaint, and respectfully refers the Court to Article 4, Section 420 of the Real Property Tax Law, for the accurate meaning, intent and statement of the law. The Tax Commission of the City of New York was required to determine whether, under the Constitution of the State of New York and the provisions of the Real Property Tax Law, the real property of religious corpora-

tions within the City of New York were entitled to exemption from taxation.

IV. Denies each and every allegation contained in paragraph "Seventh" of the complaint.

V. Denies any knowledge or information sufficient to form a belief contained in that part of paragraph "Eighth" of the complaint which relates to plaintiff's religion. Denies each and every other allegation contained in the remainder of paragraph "Eighth" of the complaint.

VI. Denies each and every allegation contained in paragraph "Ninth" of the complaint.

As a First, Separate and Distinct Defense to the Complaint Herein:

VII. The Real Property Tax Law provides that the real property of a corporation or association organized exclusively (among other purposes) for religious purposes, and used exclusively for carrying out thereupon such purposes, should be exempt from taxation. The defendant, the Tax Commission of the City of New York is required to determine what real property in the City of New York should be exempt from taxation. The assessors, as required by law, annually inspect every parcel of real property including tax exempt property, and as to such property the inspection is directed to the ownership and use thereof.

VIII. Defendant ascertained all the facts required by law necessary to determine the taxable status of the said real property owned by religious corporations and duly determined that such properties were entitled to tax exemption pursuant to Article 4, Section 420 of the Real Property Tax Law.

As a Second, Separate and Distinct Defense to the Complaint Herein:

IX. The plaintiff did not file any application for correction of or protest against the determination of defendant on or before March 15, 1967, nor was such determination challenged in any manner whatsoever.

X. By reason of the premises, the determination of defendant exempting the properties of religious corporations from taxation become final and binding on March 15, 1967.

As a Third, Separate and Distinct Defense to the Complaint Herein:

XI. The complaint fails to set forth facts sufficient to constitute grounds for the relief sought or any other relief.

XII. The Court should not proceed in this action in the absence of the Attorney General as a party to this action pursuant to Section 71 of the Executive Law.

WHEREFORE, defendant respectfully prays that the complaint herein be dismissed with costs and disbursements of this action.

J. LEE RANKIN
Corporation Counsel
Attorney for Defendant Tax Commission of The City of New York
Office & P. O. Address:
Municipal Building
Borough of Manhattan
New York, N. Y. 10007

(Verified by E. J. McLaughlin, June 27, 1967.)

Notice of Motion for Summary Judgment

SUPREME COURT

NEW YORK COUNTY

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of Frederick Walz, sworn to the eleventh day of December, 1967, the annexed exhibit and the Complaint and Answer herein the Plaintiff will move this Court under Civil Practice Law and Rules 3212-3, at A Special Term, Part I thereof, to be held in and for the County of New York at the County Courthouse, Foley Square, New York City, on the twenty-first day of December, 1967, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order striking out defendant's Answer and directing the entry of summary judgment for plaintiff upon the cause of action set forth in the Complaint, and for such other and further relief as may be just and equitable.

Answering affidavits are required to be served on plaintiff's attorney on or before December 18, 1967.

Dated, New York City, December 11, 1967.

To:

J. Lee Rankin, Esq.,
Corporation Counsel,
Attorney for Defendant,
Municipal Building,
New York City.

Frederick Walz,
Attorney pro se,
60 East 42nd Street,
New York City 10017,
MU 2-3544.

Affidavit of Frederick Walz

SUPREME COURT

NEW YORK COUNTY

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, SS.:

FREDERICK WALZ, being duly sworn, deposes and says:

That he is the plaintiff herein.

That the summons and verified complaint herein were duly filed in the office of the county clerk of New York County and are indexed No. 11141—1967.

On June 15, 1967 service of process was effected on the defendant and on June 28, 1967 an Answer was served on behalf of the defendant by J. Lee Rankin, Esq., Corporation Counsel. Copies of the pleadings are attached hereto.

All proceedings herein have been regular and there has been no amendment of pleadings.

This affidavit is made in support of plaintiff's motion to strike out the Answer on the ground that it is sham and insufficient and that there is no triable issue of fact.

This action is to enjoin defendant permanently from granting certain exemptions from real property taxes.

The Answer consists of denials and separate defenses.

Deponent believes that there is no valid defense to the cause of action set forth in the Complaint.

1. Defendant denies knowledge or information as to plaintiff's allegation that he is a citizen, although it has notice that plaintiff is a member of the New York Bar. Attached hereto and made part hereof is a photocopy of plaintiff's recorded deed to the real property mentioned in the Complaint.

II, III, IV, V and VI of defendant's denials do not, plaintiff submits, raise a triable issue of fact.

The First and Third Separate defenses do not, plaintiff submits, raise a triable issue of fact.

The defendant's Second Separate defense refers to an Article 78 proceeding and is not relevant in this plenary action.

WHEREFORE, plaintiff moves that the Answer of the defendant be stricken as sham and insufficient and that summary judgment be granted plaintiff for the relief demanded in the Complaint, and for such other and further relief as may be just and equitable.

FREDERICK WALZ

(Sworn to December 11, 1967.)

EXHIBIT ANNEXED TO FOREGOING AFFIDAVIT

[redacted]

THIS INDENTURE, made the 20th day of May [illegible] nineteen hundred and sixty Seven

BETWEEN

Miriam Burstein, residing at 230-14 Merrick Boulevard Laurelton County of Queens, City and State of New York

party of the first part, and

FREDERICK WALZ, residing at [illegible] 42nd Street County City and State of New York

party of the second part,

WITNESSETH that the party of the first part, in consideration of Ten Dollars and other valuable consideration paid by the party of the second part, does hereby grant and release unto the party of the second part, the heirs or successors and assigns of the party of the second part forever,

ALL [illegible] the buildings and improvements thereon erected, situate, lying and being [illegible] Rich[illegible] New York

[redacted]

TOGETHER with the appurtenances and all the estate and rights of the party of the first part, in and to said premises. TO HAVE AND TO HOLD the premises herein granted unto the party of the second part, the heirs or successors and assigns of the party of the second part forever.

AND the party of the first part covenants that the party of the first part has not done or suffered anything whereby the said premises have been encumbered in any way whatever, except as aforesaid.

AND the party of the first part, in compliance with Section 13 of the Lien Law, covenants that the party of the first part will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

The word party shall be construed as if it read parties whenever the sense of this indenture so requires.

IN WITNESS WHEREOF, the party of the first part has duly executed this deed the day and year first above written.

IN PRESENCE OF:

Miriam Burstein

Affidavit of Daniel L. Cammarano in Opposition to Motion for Summary Judgment and in Support of Defendant's Request for Summary Judgment

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

DANIEL L. CAMMARANO, being duly sworn deposes and says:

1. That I am a Deputy Assistant Corporation Counsel in the office of the Corporation Counsel attorney for the defendant and conversant with the facts herein.

This affidavit is submitted in opposition to plaintiff's motion for summary judgment and in support of defendant's request for summary judgment.

2. That the defendant, the Tax Commission of the City of New York requests that pursuant to §3211 of the CPLR that the action herein be dismissed for failure to state a cause of action and also for failing to include as a necessary party herein the Attorney General of the State of New York.

3. Pursuant to Article 5 §71 of the Executive Law of the State of New York the court or justice before whom such

action or proceeding is pending, may make an order, directing the party desiring to raise the constitutionality of a statute to serve notice thereof on the attorney general permitting him to appear at any such trial or hearing in support of the constitutionality of such statute.

4. The plaintiff, attorney *pro se* states in his complaint that he is a citizen of the United States and the owner in fee of real property located in the County of Richmond, designated on the tax map as Section 1, Block 198, Lot 210.

5. Plaintiff further alleges in substance that the defendant Tax Commission granted tax exemption to all religious corporations for all real property owned and used by them for religious purposes pursuant to Article 16 of the State Constitution, for the tax year commencing on July 1, 1967.

6. Plaintiff further alleges in paragraph "SEVENTH" that the action of defendant in exempting the real property of religious corporations was violative of Amendments I and XIV of the Constitution of the United States.

7. Plaintiff further alleges that he is compelled to contribute "to the financial support of the aforesaid religious organizations which are private bodies, in violation of his religious freedom * * * , and that said action of defendant confiscates his property without due process of law."

8. Plaintiff further alleges that he has no adequate remedy at law. He seeks judgment that the tax exemption granted religious organizations be declared illegal, and that defendant be restrained perpetually and during the pendency of this action from granting tax exemption.

9. The plaintiff has failed to show that he has been deprived of his rights under the Amendment I of the Constitution of the United States which states:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; * * * "

10. The plaintiff has failed to establish that Article 16 of the New York State Constitution and §420 of the Real Property Tax Law affects him injuriously and actually deprives him of any constitutional rights under either the I and XIV Amendments of the Constitution of the United States.

11. The property of religious institutions are exempted from taxation by law for the reason that it is the policy and the interest of the State to encourage them in the sense that they are contributing the fruits of their enterprise to society, and the municipality benefits by an amount approximately equal to the taxes which it does not collect.

12. The customary constitutional inhibition of any law respecting an establishment of religion etc., is not violated by an exemption of church property from taxation.

13. The States real property tax is for public purposes in order to secure revenue for the local governing powers and the individual is compensated by the special or general benefits which he receives from the existence and operations of the local governments.

14. The real property tax operates uniformly to all those subject to it as well as those who are exempt from taxes.

15. Article 16 of the New York State Constitution provides as follows:

"Subdivision 1.

Article 16, Section 1.

The power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law. • • •

Exemption from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit."

16. Section 420, Subdivision 1 of the Real Property Tax Law provides in part as follows:

"Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tracted, charitable, benevolent, missionary, hospital, infirmary, educational, public playgrounds, scientific, literary, bar association, library, patriotic, historical or cemetery purposes, • • • , and used exclusively for carrying out thereupon one or more of such purposes • • • shall be exempt from taxation as provided in this section."

17. The State Constitution, Article 16 and Section 420 of the Real Property Tax Law are not in conflict with

the I and XIV Amendments of the Constitution of the United States.

18. The plaintiff has failed to establish that he has been aggrieved or injured by the real estate tax exemptions accorded to religious organizations and associations made pursuant to Article 16 of the State Constitution and Section 420 of the Real Property Tax Law.

WHEREFORE, your deponent respectfully requests that this Court deny the plaintiffs' motion for summary judgment dismissing the complaint.

DANIEL L. CAMMARANO

(Sworn to December 15, 1967.)

Reply Affidavit of Frederick Walz

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

FREDERICK WALZ, being duly sworn, deposes and says:

That he is the plaintiff herein and denied the allegations in paragraphs 10 and 11 of defendant's answering affidavit, and cites the cruelty to animals and the interminable political activity of religious organizations as some of their conduct detrimental to the welfare of society.

Deponent submits that it is morality, not belief, which is of interest to society and that morality can exist independently of belief. Moreover, a person can be recognized as religious without being a member of any organization, according to the United States Supreme Court in U. S. v. Seeger, 85 Supreme Court Reporter 850, et seq.

It was the Founder of Christianity who said "Wherever two or three are gathered in My name, there am I."

The most distinguished American humanitarians—to name them chronologically—Dorothea Lynn Dix, Abraham Lincoln, Clara Barton, Henry Bergh, Jane Addams, Jacob Riis, Winifred Hoyt and Margaret Sanger were not identified with any religious organization. They carried enormous burdens because religious organizations did not meet their responsibility; sometimes, indeed, such organizations opposed their efforts. This is not to say that no humane persons belong to such organizations. However, history

throughout records unspeakable cruelty inflicted at the instigation of such organizations.

The remaining relevant parts of the Answering affidavit are disposed of, deponent contends, by the opinions of the Justices of the United States Supreme Court in the Everson case.

FREDERICK WALZ

JOSEPHINE CARLSON
Notary Public, State of New York

(Sworn to December 20, 1967.)

Order Appealed From

SUPREME COURT
STATE OF NEW YORK

COUNTY OF NEW YORK

SPECIAL TERM—PART I

[SAME TITLE]

Present:

HON. ARTHUR MARKEWICH,

Justice.

The following papers numbered 1 to 8 read on this motion Submitted

No. 160 on Calendar of Dec. 21, 1967.

	Papers Numbered
Notice of Motion—Exhibits—and Affidavits Annexed	1-5
Answering Affidavit and Answer	6-7
Replying Affidavit	8

Upon the foregoing papers this motion—by plaintiff for summary judgment against respondent Tax Commission is denied; cross-motion for summary judgment dismissing the complaint is granted. Though the procedure used by plaintiff is technically infirm, decision is on the merits. Plaintiff

an owner of property, sues to restrain defendant's grant of tax exemption to religious organizations (§420, R. P. Tax L.) as in contravention of the first and fourteenth amendments of the Constitution of the United States. No allegation is made that defendant proceeded otherwise than pursuant to law; rather, it is the law itself which is under attack. Such exemptions are granted in pursuance of long-standing, public policy of this State, under a statute which is presumptively constitutional, and which is hereby sustained.

Dated: March 5, 1968

ARTHUR MARKEWICH
J.S.C.

Judgment Appealed From

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Reg. 580 Fol. 486

[SAME TITLE]

The defendant, Tax Commission of the City of New York, having cross-moved for summary judgment dismissing the complaint herein for failure to state a cause of action, pursuant to the provisions of Rule 3211 of the CPLR, and an order having been duly entered in the office of the Clerk of the Supreme Court, County of New York, on the 5th day of March 1968, granting the cross-motion, and dismissing the complaint, and the costs of the defendant, having been duly taxed at the sum of $25.00.

Now on motion of J. Lee Rankin, Corporation Counsel, attorney for defendant, Tax Commission of the City of New York, it is

ADJUDGED that the complaint be and the same hereby is dismissed, and it is further

ADJUDGED that the defendant, Tax Commission of the City of New York (Municipal Building, New York, N. Y. 10007) recover of the plaintiff Frederick Walz (60 East 42nd Street, New York, N. Y.) the sum of $25.00, costs as taxed, and that said defendant have execution therefor.

Judgment entered this 22nd day of March, 1968.

JAMES MCGURRIN
Clerk

mw4

BILL OF COSTS

New York Supreme Court,

COUNTY OF NEW YORK

FREDERICK WALZ

Plaintiff.

against

TAX COMMISSION OF THE CITY OF NEW YORK

Defendant.

Costs of the defendant

Rec. 580 Fee. 486 Tax

INDEX NUMBER 11141/67

COSTS			DISBURSEMENTS			
Costs before Note of Issue	25	00	Transcript and Filing			
" after " " "			Referee's Fees			
Trial Fee, Issue of Fact			Serving Summons and Complaint			
Allowance by Statute			Sheriff's Fees on Execution			
" " Court			Printing Cases Appellate Division			
Motion			" Points Appellate Division			
Costs Allowed by Appellate Term Order			" Cases Court of Appeals			
Costs Allowed by Appellate Division Order			" Points Court of Appeals			
Costs Allowed by Court of Appeals Order			Copy Stenographer's Minutes			
Appeal to Appellate Division before Argument			Remittitur			
" " " " for Argument			Telegrams			
" Court of Appeals before Argument						
" " " " for Argument						
			Attendance of Witnesses,	Miles	Days	
Disbursements						
Total	25	00				

I hereby certify that I have adjusted this bill of costs at

$ 25.00

MAR 22 1968

JAMES McGUINN

CLERK

State of New York, County of New York, ss.:

JOHN F. KELLY, being duly sworn, says that he is an attorney and counsellor-at-law in the office of the Corporation Counsel; that the foregoing disbursements have been made in this action, or will be necessarily incurred herein, and are reasonable in amount; that each of the persons above named as a witness was a necessary and material witness, subpoenaed in good faith, and attended as such on the trial of this action the number of days set opposite his or her name, and resided, and necessarily traveled, the number of miles set opposite his or her name, in going to the place of trial; and that copies of papers as charged herein were actually and necessarily obtained for use in this action; that the copy of stenographer's minutes was necessarily obtained and actually used in preparing amendments to plaintiff's proposed case on appeal; that the plaintiff did not lend or offer to lend a copy of said minutes to the defendant, to the best of his knowledge and belief.

Sworn to before me this

Notice of Appeal

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index 11141—1967

FREDERICK WALZ,

Plaintiff,

—against—

TAX COMMISSION OF THE CITY OF NEW YORK,

Defendant.

SIRS:

PLEASE TAKE NOTICE that the above-named plaintiff, Frederick Walz, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, in and for the First Department, from an order entered in the above-entitled action on or about the fifth day of March, 1968, in the office of the Clerk of the County of New York, denying plaintiff's motion for summary judgment on the cause of action set forth in the complaint and granting defendant's cross-motion for summary judgment dismissing the complaint, and said plaintiff appeals from each and every part of said order as well as the whole thereof.

PLEASE TAKE FURTHER NOTICE that said above-named plaintiff, Frederick Walz, also hereby appeals to said Appellate Division from judgment entered in the above-entitled ac-

tion on or about the twenty-second day of March, 1968, in the office of the Clerk of the County of New York in favor of defendant, Tax Commission of the City of New York and against said plaintiff, Frederick Walz, and said plaintiff appeals from each and every part of said judgment as well as the whole thereof.

Dated: New York, March 27, 1968.

Yours, etc.,

FREDERICK WALZ,
Attorney for Plaintiff,
Office and Post Office Address
60 East 42nd Street
Borough of Manhattan
MU 2-3544

To:

J. LEE RANKIN, Esq.,
Corporation Counsel,
Attorney for Defendant,
Municipal Building,
Borough of Manhattan.

CLERK OF THE COUNTY OF NEW YORK.

Certification of Record in Appellate Division (omitted in printing).

Order of Affirmance Appealed From

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 20th day of June, 1968.

Present:

HON. HAROLD A. STEVENS,
Justice Presiding,

" ARON STEUER,
" GEORGE TILZER,
" OWEN McGIVERN,
" BENJAMIN J. RABIN,
Justices.

13361

An appeal having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County, entered on the 5th day of March, 1968, denying plaintiff's motion for summary judgment on the cause of action set forth in the complaint and granting defendant's cross-motion for summary judgment dismissing the complaint, and from the judgment entered in the office of the Clerk of the County of New York, on the 22nd day of March, 1968, and said appeal having been argued by Mr. Frederick Walz, of counsel for the appellant, and by Mr. Edith I. Spivack, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the order and judgment so appealed from be and the same are hereby, in all things, affirmed; and that the respondent recover of the appellant $50 costs of this appeal.

Enter:

HYMAN W. GAMSO,
Clerk.

Affirmation of No Opinion in Appellate Division

I, FREDERICK WALZ, an attorney, hereby state that I am familiar with the facts, papers and proceedings herein, and that no opinion was rendered by the court below.

FREDERICK WALZ

Notice of Appeal to Court of Appeals

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that the plaintiff above named, relying solely upon the question directly involving the construction of the provisions of the first and fourteenth amendments of the Constitution of the United States, hereby appeals as of right to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Department, entered in the office of the Clerk of said Appellate Division on the 20th day of June, 1968, which unanimously affirmed the order and judgment of the Supreme Court of New York County in the above-entitled proceeding, entered in the office of the Clerk of the County of New York on the 5th and 22nd days of March, 1968, respectively, denying plaintiff's motion for summary judgment on the cause of action set forth in the complaint and granting defendant's cross-motion for summary judgment dismissing the complaint and plaintiff ap-

peals from each and every part of the said order of the Appellate Division, as well as from the whole thereof.

July 2, 1968.

Yours, etc.,

FREDERICK WALZ,
Attorney for Plaintiff-Appellant, pro se,
60 East 42 Street
New York City 10017

To:

CLERK OF THE COUNTY OF NEW YORK,

J. LEE RANKIN, Esq.,
Corporation Counsel,
Attorney for defendant-respondent,
Municipal Building,
New York City.

Certification of Record in Court of Appeals (omitted in printing).

Remittitur

No. 362

(1968)

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 20th day of February in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.
RAYMOND J. CANNON,
Clerk.

REMITTITUR February 20, 1969.

---

1. No. 362. 68

FREDERICK WALZ,

Appellant,

—VS.—

TAX COMMISSION OF THE CITY OF NEW YORK,

Respondent.

BE IT REMEMBERED, That on the 19th day of July in the year of our Lord one thousand nine hundred and sixty-eight, Frederick Walz, the appellant in this cause, came here unto the Court of Appeals, pro se, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Tax Commission of the City of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by J. Lee Rankin, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals, this cause having been submitted, after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now re-

mains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, February 20, 1969.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal)

RAYMOND J. CANNON
Clerk.

Opinion of the Court of Appeals of the State of New York

Unrevised and
Uncorrected. Not
For Publication.

STATE OF NEW YORK
COURT OF APPEALS

1. No. 362. 68

FREDERICK WALZ,

Appellant,

vs.

TAX COMMISSION OF THE CITY OF NEW YORK,

Respondent.

PER CURIAM:

Firmly embedded in the law of this State, both by Constitution (art. XVI, §1) and by statute (Real Property Tax Law, §420), is the doctrine that real property owned by a religious corporation and used exclusively for religious purposes is exempt from taxation (see, e.g., *People ex rel. Watchtower Bible & Tract Soc.* v. *Haring,* 8 N Y 2d 350, 357-358; *People ex rel. Church of St. Mary* v. *Feitner,* 168 N. Y. 494, 497) and research discloses—and the 2½ page brief of the plaintiff-appellant herein cites no authority to the contrary—that courts throughout the country have long and consistently held that the exemption of such real property from taxation does not violate the Constitution of

the United States. (See, e.g., *Trustees of Griswold College* v. *State of Iowa,* 46 Iowa 275, 282 [1877]; *Methodist Episcopal Church, South* v. *Hinton,* 92 Tenn. 188 [1892]; *Garrett Biblical Institute* v. *Elmhurst State Bank,* 331 Ill. 308 [1928]; *Lundberg* v. *County of Alameda,* 46 Cal. 2d 644, app. dismd. 352 U. S. 921 [1956]; *General Finance Corp.* v. *Archetto,* 93 R. I. 392, app. dismd. 369 U. S. 423 [1962]; *Murray* v. *Comptroller of the Treasury,* 241 Md. 383, cert. den. 385 U. S. 865 [1966]; see, also *Abington School District* v. *Schempp,* 374 U. S. 203, 301 [*per* Brennan, J., concurring [1963]]. But see, contra, *Engel* v. *Vitale,* 370 U. S. 421, 437, *per* Douglas, J., concurring [1962].) We see no reason for departing from this conclusion in this case.

The question of the plaintiff's standing to maintain this action has not been raised.

The order appealed from should be affirmed, with costs.

• • • • •

Order affirmed, with costs. Opinion Per Curiam. All concur, Burke, J., in result.

Notice of Appeal

SUPREME COURT

NEW YORK COUNTY

Index No. 11141—67

FREDERICK WALZ,

Plaintiff-appellant,

against

TAX COMMISSION OF THE CITY OF NEW YORK,

Defendant-appellee.

TO THE SUPREME COURT OF THE UNITED STATES:

NOTICE IS HEREBY GIVEN that Frederick Walz, the plaintiff-appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment and order of the New York Court of Appeals, affirming the order of the Appellate Division of the Supreme Court, entered in this action February 20, 1969 and the order of remittitur filed in the office of the Clerk of the County of New York on March 4, 1969.

This appeal is taken pursuant to 28 U. S. Code, Sec. 1257(2).

New York City, April 4, 1969

FREDERICK WALZ,
Plaintiff-appellant pro se
60 East 42 Street
New York City 10017

To:

J. LEE RANKIN, Esq.,
Corporation Counsel,
Attorney for Defendant-appellee,
Municipal Building,
New York City.

COUNTY CLERK, NEW YORK COUNTY.

Affidavit of Service

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

I, FREDERICK WALZ, plaintiff-appellant, being duly sworn depose and say that on the 4th day of April, 1969 I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the Tax Commission of the City of New York, defendant-appellee herein, by delivering the same to the clerk designated by defendant-appellee's attorney to receive service of papers in the office of J. Lee Rankin, Esq., counsel of record for said defendant-appellee, located in the Municipal Building, New York City.

Acknowledgment of said service is made by said counsel, indicated by time-clock stamp appearing on the face of the said Notice of Appeal.

All parties required to be served have been served.

Subscribed and sworn to before
me this 4th day of April, 1969.

FREDERICK WALZ

JACOB ROTTER
(Notary Stamp)

Supreme Court of the United States

No. 1415 ---- , *October Term, 19* 68

Frederick Walz,

Appellant,

v.

Tax Commission of the City of New York

APPEAL from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

June 16, 1969

FILE COPY

FILED

MAY 20 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 135

FREDERICK WALZ,

Appellant,

—against—

TAX COMMISSION OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

FREDERICK WALZ
Attorney for Appellant, Pro Se
60 East 42nd Street
New York, New York 10017

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

FREDERICK WALZ,

Appellant,

—against—

TAX COMMISSION OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant Frederick Walz appeals from the judgment of the Court of Appeals of New York entered on February 20, 1969, affirming the judgment of the Appellate Division, First Department, which affirmed the judgment of the Supreme Court, New York County.

This Statement is submitted to show that this Court has jurisdiction over the appeal and that the questions are substantial and deserving of plenary consideration.

Opinions Below

The February 20, 1969 order of Remittitur of the Court of Appeals and Opinion (marked "not for publication") are appended hereto as Appendices A and B respectively.

Copy of this order of the Appellate Division and of the judgment of the Supreme Court, New York County, are attached as Appendix C and Appendix D, respectively.

Jurisdiction

This action was commenced by appellant to restrain appellee from allowing real estate tax exemption to religious organizations as authorized by Article 16 of the Constitution of the State of New York on the ground that said exemption is in violation of the first and fourteenth amendments of the federal constitution.

On or about March 5, 1968, the Supreme Court of the State of New York, New York County, entered an order denying appellants' motion for summary judgment and granting appellee's cross-motion for summary judgment dismissing the complaint and judgment was entered accordingly on or about the 22nd day of March, 1968, in the office of the Clerk of New York County. Appellant appealed therefrom to the Appellate Division, First Department, on March 27, 1968.

The Appellate Division, First Department, affirmed unanimously, without opinion, by order entered in the office of the Clerk of said Appellate Division on June 20, 1968.

From said order of the Appellate Division, appellant appealed to the Court of Appeals on July 2, 1968, specifying the first and fourteenth amendments of the federal constitution.

The jurisdiction of this Court to review the judgment of the Court of Appeals of New York on direct appeal is conferred by 28 U.S.C. Sec. 1257(b). Appellant relies on the following cases:

Everson v. *Board of Education,* 330 U.S. pp. 31-2;
McGowan v. *Maryland,* 366 U.S. pp. 442-3;
Torcasso v. *Watkins,* 367 U.S. 492-3, 5;
Abington v. *Schempp,* 374 U.S. 217.

Statutes and Rules Involved

Article 16, Sec. 1 of the New York State Constitution and Sec. 420, sub. 1 of the Real Property Tax Law of New York authorize real property tax exemption of religious organizations. The pertinent parts of these provisions are set forth in Appendices E and F, respectively.

Question Presented

Did the Court of Appeals err in holding that the real property tax exemption of religious organizations is not in violation of the first and fourteenth amendments of the federal constitution?

Statement

When the suit for an injunction was commenced appellant was, and still is, a real property taxpayer of the City of New York and, as further alleged in the complaint, a religious person not a member of any religious organization.

The appellee, as authorized by Sec. 420, subd. 1 of the Real Property Tax Law and Article 16, Sec. 1 of the New York state constitution, regularly grants exemptions from real property taxation to religious organizations on real property used exclusively for religious purposes.

In the complaint, and in the subsequent appeals, appellant contended that the aforesaid exemption violates the first and fourteenth amendments of the federal constitution.

Neither the trial court at Special Term nor the Appellate Division cited any authority against appellant's contention.

The Court of Appeals, unanimously affirming the Appellate Division, cited a number of cases, none of which is squarely in point and each of which is distinguishable, as follows:

People v. *Haring; People* v. *Feitner; Trustees* v. *State of Iowa* and *M. E. Church* v. *Hinton*—all make no reference to the federal constitution.

Garrett v. *Elmhurst* and *Lundberg* v. *Co. of Alameda* —in both cases the tax exemption benefited the public purpose of education.

General Finance Corp. v. *Archetta*—plaintiff was a 'soulless' corporation.

Murray v. *Comptroller*—natural person plaintiffs were atheists (having no religious right suffering infringement) and the corporate co-plaintiff was entitled to the tax exemption it complained of.

Abington v. *Schempp* and *Engel* v. *Vitale*—were "public school religious exercise" cases; in the first a single concurring opinion favored constitutionality of the exemption for religious organizations and in the second a single concurring opinion opposed it. Neither cited authority.

The Question Presented Is Substantial

The civil right of religious freedom of appellant, and all others similarly situated, is affected herein.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

FREDERICK WALZ
Appellant Pro Se

May, 1969

APPENDICES

APPENDIX A

Remittitur

No. 362

(1968)

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 20th day of February in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.
RAYMOND J. CANNON,
Clerk.

REMITTITUR February 20, 1969.

---

1. No. 362. 68

FREDERICK WALZ,

Appellant,

—VS.—

TAX COMMISSION OF THE CITY OF NEW YORK,

Respondent.

BE IT REMEMBERED, That on the 19th day of July in the year of our Lord one thousand nine hundred and sixty-eight, Frederick Walz, the appellant in this cause, came here unto the Court of Appeals, pro se, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Tax Commission of the City of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by J. Lee Rankin, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals, this cause having been submitted, after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now re-

mains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, February 20, 1969.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal)

RAYMOND J. CANNON
Clerk.

APPENDIX B

Opinion of the Court of Appeals of the State of New York

Unrevised and
Uncorrected. Not
For Publication.

STATE OF NEW YORK
COURT OF APPEALS

1. No. 362. 68

FREDERICK WALZ,

Appellant,

vs.

TAX COMMISSION OF THE CITY OF NEW YORK,

Respondent.

PER CURIAM:

Firmly embedded in the law of this State, both by Constitution (art. XVI, §1) and by statute (Real Property Tax Law, §420), is the doctrine that real property owned by a religious corporation and used exclusively for religious purposes is exempt from taxation (see, e.g., *People ex rel. Watchtower Bible & Tract Soc.* v. *Haring,* 8 N Y 2d 350, 357-358; *People ex rel. Church of St. Mary* v. *Feitner,* 168 N. Y. 494, 497) and research discloses—and the 2½ page brief of the plaintiff-appellant herein cites no authority to the contrary—that courts throughout the country have

long and consistently held that the exemption of such real property from taxation does not violate the Constitution of the United States. (See, e.g., *Trustees of Griswold College* v. *State of Iowa,* 46 Iowa 275, 282 [1877]; *Methodist Episcopal Church, South* v. *Hinton,* 92 Tenn. 188 [1892]; *Garrett Biblical Institute* v. *Elmhurst State Bank,* 331 Ill. 308 [1928]; *Lundberg* v. *County of Alameda,* 46 Cal. 2d 644, app. dismd. 352 U. S. 921 [1956]; *General Finance Corp.* v. *Archetto,* 93 R. I. 392, app. dismd. 369 U. S. 423 [1962]; *Murray* v. *Comptroller of the Treasury,* 241 Md. 383, cert. den. 385 U. S. 865 [1966]; see, also *Abington School District* v. *Schempp,* 374 U. S. 203, 301 [*per* Brennan, J., concurring [1963]]. But see, contra, *Engel* v. *Vitale,* 370 U. S. 421, 437, *per* Douglas, J., concurring [1962].) We see no reason for departing from this conclusion in this case.

The question of the plaintiff's standing to maintain this action has not been raised.

The order appealed from should be affirmed, with costs.

• • • • •

Order affirmed, with costs. Opinion Per Curiam. All concur, Burke, J., in result.

APPENDIX C

Order of Affirmance Appealed From

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 20th day of June, 1968.

Present:

HON. HAROLD A. STEVENS,
Justice Presiding,

" ARON STEUER,
" GEORGE TILZER,
" OWEN MCGIVERN,
" BENJAMIN J. RABIN,
Justices.

13361

An appeal having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County, entered on the 5th day of March, 1968, denying plaintiff's motion for summary judgment on the cause of action set forth in the complaint and granting defendant's cross-motion for summary judgment dismissing the complaint, and from the judgment entered in the office of the Clerk of the County of New York, on the 22nd day of March, 1968, and said appeal having been argued by Mr. Frederick Walz, of counsel for the appellant, and by Mr. Edith I. Spivack, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered ε adjudged that the order and judgment so appealed fr be and the same are hereby, in all things, affirmed; anhat the respondent recover of the appellant $50 costs oais appeal.

Enter:

HAN W. GAMSO,
Clerk.

APPENDIX D

Judgment Appealed From

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Reg. 580 Fol. 486

[SAME TITLE]

The defendant, Tax Commission of the City of New York, having cross-moved for summary judgment dismissing the complaint herein for failure to state a cause of action, pursuant to the provisions of Rule 3211 of the CPLR, and an order having been duly entered in the office of the Clerk of the Supreme Court, County of New York, on the 5th day of March 1968, granting the cross-motion, and dismissing the complaint, and the costs of the defendant, having been duly taxed at the sum of $25.00.

Now on motion of J. Lee Rankin, Corporation Counsel, attorney for defendant, Tax Commission of the City of New York, it is

ADJUDGED that the complaint be and the same hereby is dismissed, and it is further

ADJUDGED that the defendant, Tax Commission of the City of New York (Municipal Building, New York, N. Y. 10007) recover of the plaintiff Frederick Walz (60 East 42nd Street, New York, N. Y.) the sum of $25.00, costs as taxed, and that said defendant have execution therefor.

Judgment entered this 22nd day of March, 1968.

JAMES McGURRIN
Clerk

APPENDIX E

Article 16, Sec. 1, of the New York State Constitution:

Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit.

APPENDIX F

Sec. 420, sub. 1, Real Property Tax Law of New York:

Real property owned by a corporation or association organized exclusively for . . . religious . . . purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section.

FILE COPY

(39427)

Office-Supreme Court
FILED
MAY 31 19
JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~1975~~ 135

FREDERICK WALZ,

Appellant,

against

TAX COMMISSION OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

J. LEE RANKIN,
Corporation Counsel,
Counsel for Appellee,
Municipal Building,
New York, N. Y. 10007.

STANLEY BUCHSBAUM,
EDWARD J. MCLAUGHLIN,
EDITH I. SPIVACK,
of Counsel.

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In the

Supreme Court of the United States

October Term, 1968

No. 1415

Frederick Walz,

Appellant,

against

Tax Commission of the City of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

The appellee moves pursuant to Rule 16 of the Rules of the Supreme Court of the United States to dismiss the appeal on the ground that some of the questions presented were not raised in the Courts below and all of them are so unsubstantial as not to need further argument.

Preliminary Statement

The appellant has appealed from the order of the Court of Appeals of the State of New York, dated February 20, 1969, affirming an order of the Appellate Division of the Supreme Court of that State.

The opinion of the Court of Appeals is reported in 24 N Y 2d 30, 246 N.E. 2d 517, and its text is set forth in Appendix B of the appellant's jurisdictional statement (pp. 4a-5a). The Appellate Division decision is officially reported in 30 A D 2d 778, and the text of the order of affirmance is set forth in Appendix C of that statement (p. 6a). The memorandum opinion of the Special Term of the Supreme Court is not officially reported and is set forth in Appendix I to this motion.

By this appeal, the appellant challenges the constitutional validity of New York State Constitution, Article 16, §1, and New York Real Property Tax Law, §420, subd. 1, providing for exemption from taxation of real property owned by a religious corporation and used exclusively for religious purposes. It contends that such exemption contravenes the First and Fourteenth Amendments of the Constitution of the United States.

Statement of the Case

The action was commenced on June 15, 1967, by the service of a summons and verified complaint upon the Tax Commission (9-12).* The Tax Commission served a verified answer containing three separate and distinct defenses, on June 28, 1967 (1, 13-15). Thereafter, appellant moved under CPLR, §§3212 and 3213, for an order striking out defendant's answer and directing the entry of summary judgment for appellant upon the cause of action set forth in the complaint (17-25). The appellee opposed the motion and under CPLR, §3211, also requested summary judgment

* Numbers in parentheses refer to pages in the New York Court of Appeals record on appeal.

dismissing the complaint (25-30). Appellant submitted an affidavit in reply (31-32).

The Special Term of the Supreme Court denied the appellant's motion for summary judgment and granted the appellee's cross-motion for summary judgment dismissing the complaint. Passing over the technical infirmities of the action, the Court upheld the constitutionality of the exemption, stating in a brief opinion, 'Such exemptions are granted in pursuance of long-standing public policy of this State, under a statute which is presumptively constitutional, and which is hereby sustained' (Appendix I to this motion).

The Appellate Division unanimously affirmed, without opinion (37-8). Upon appeal by appellant to the Court of Appeals of the State of New York that Court affirmed unanimously, with all but one judge concurring in a *per curiam* opinion (Appendix to Appellant's Jurisdictional Statement, pp. 4a-5a).

In essence, the pleadings relate that appellant, an attorney *pro se,* is a citizen of the United States and the owner in fee of real property located in the County of Richmond of New York City, designated on the Tax Map as Section 1, Block 198, Lot 210 (10). His complaint is that the tax exemption granted to religious corporations for real property owned and used by them for religious purposes for the tax year commencing July 1, 1[illegible], "constitutes an involuntary payment by plaintiff to aforementioned religious organizations, in violation of plaintiff's right of religious freedom" and confiscates his property "without due process of law, in violation of the provisions of the Constitution of the United States of America" (11-12).

The Tax Commission answered that the taxable status of real property owned by religious corporations was determined in accordance with the law appertaining thereto and that the appellant was neither aggrieved thereby nor deprived of any rights sufficient to state a cause of action (16, 30).

ARGUMENT

Tax exemptions for property of religious organizations do not violate the United States Constitution.

(1)

In two recent cases this Court dismissed for "want of a substantial federal question" appeals from determinations sustaining the constitutionality of tax exemptions for religious organizations. *General Finance Corp.* v. *Archetto*, 93 R.I. 392, 176 A. 2d 73 (1961), app. dism., 369 U.S. 423 (1962); *Lundberg* v. *County of Alameda*, 46 Cal. 2d 644, 298 P. 2d 1 (1956), app. dism. *sub. nom. Heisey* v. *County of Alameda*, 352 U.S. 921 (1956).

The appellant's attempt to detract from the force of these decisions has no merit (Appl't's Jurisdictional Statement, p. 4). The comment that the first is distinguishable because plaintiff was a 'soulless' corporation is indeed idle. There is nothing in the opinion of the Court to lend substance to the conclusion that the corporate form of the plaintiff was in any way a persuasive factor. And as for the second, about which appellant states "the tax exemption benefited the public purpose of education," its wider pertinence and particular relevance to the issue herein is stated in the opinion of the Court as follows (298 P. 2d at p. 7):

"The practice of granting tax exemptions benefiting religious sects began in the colonial period. * * * Today, at least some tax exemption for religious groups is authorized by statutory or constitutional provisions in every state and the District of Columbia, as well as by federal law. See Note (1949) 49 Columb. L. Rev. 968, 969-982. No case has been found holding that the granting of such exemptions is contrary to state or federal constitutional provisions prohibiting the support or establishment of religion, and, where the matter has been raised, the exemptions have been upheld."

(2)

Other cases upholding the constitutionality of tax exemptions for religious institutions include the following: *Murray* v. *Comptroller of the Treasury,* 241 Md. 383, 216 A. 2d 897 (1966), cert. den., 385 U.S. 816 (1966); *Garrett Biblical Institute* v. *Elmhurst State Bank,* 331 Ill. 308, 163 N.E. 1, 5 (1928); *Trustees of Griswold College* v. *State of Iowa,* 46 Iowa 275, 282 (1877). See concurring opinion of BRENNAN, J. in *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 301-302 (1963). Cf. *People ex rel. Watchtower Soc.* v. *Haring,* 8 NY 2d 350, 357-358, 170 N.E. 2d 677 (1960); *People ex rel. Church of St. Mary* v. *Feitner,* 168 N.Y. 494, 497, 61 N.E. 762 (1901); *Methodist Episcopal Church, South* v. *Hinton,* 92 Tenn. 188, 21 S.W. 321 (1893). See, *contra,* concurring opinion of DOUGLAS, J. in *Engel* v. *Vitale,* 370 U.S. 421, 437 (1962).

(3)

The cases relied on by appellant while they deal with the subject of establishment of religion or freedom of religion are not in point on the issue here involved (Applt's Jurisdictional Statement, p. 3). If anything, they strengthen the decision of the Courts below, that the exemption to which appellant objects does not constitute an advance of religion in violation of any constitutional guaranty.

CONCLUSION

The appeal from the order of the Court of Appeals of the State of New York should be dismissed.

June 2, 1969.

Respectfully subnitted,

J. Lee Rankin,
Corporation Counsel,
Counsel for Appellee.

Stanley Buchsbaum,
Edward J. McLaughlin,
Edith I. Spivack,
of Counsel.

APPENDIX I

Upon the foregoing papers this motion by plaintiff for summary judgment against respondent Tax Commission is denied; cross-motion for summary judgment dismissing the complaint is granted. Though the procedure used by plaintiff is technically infirm, decision is on the merits. Plaintiff an owner of property, sues to restrain defendant's grant of tax exemption to religious organizations (§420, R.P. Tax L.) as in contravention of the first and fourteenth amendments of the Constitution of the United States. No allegation is made that defendant proceeded otherwise than pursuant to law; rather, it is the law itself which is under attack. Such exemptions are granted in pursuance of long-standing, public policy of this State, under a statute which is presumptively constitutional, and which is hereby sustained.

Dated: March 5, 1968

ARTHUR MARKEWICH

.....

J.S.C.

FILE COPY

Supreme Court, U.S.
FILED
JUN 12 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~1825~~ 135

FREDERICK WALZ,

Appellant,

against

TAX COMMISSION OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

FREDERICK WALZ
Appellant pro se
60 East 42nd Street
New York, N. Y. 10017

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1415

FREDERICK WALZ,

Appellant,

against

TAX COMMISSION OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

Attorneys for Appellee erroneously assert in their motion to dismiss appeal (pp. 1, 2) that some of the questions presented were not raised in the Courts below. They do not attempt to point out such irregularity.

Appellant, in his complaint (Transcript of Record, p. 6) alleged that the real property tax exemption of religious organizations in New York City is in violation of the First and Fourteenth Amendments of the Federal Constitution. This contention was maintained in all Courts (Transcript of Record, pp. 25, 28, 33, 38 and 39), citing *Everson* in every instance.

Appellant set forth his status in his complaint (Transcript of Record, pp. 5, 6, 22) that he is a real property taxpayer of the City of New York, that he is a Christian and not a member of any religious organization, rejecting them as hostile. This Court has held, *U. S.* v. *Seeger,* 380 U.S. 172:

> "The Congress recognized that one might be religious without belonging to an organized church."

In his reply affidavit on the motion for summary judgment (Transcript of Record, p. 22) appellant quoted the Founder of Christianity:

> "Wherever two or three are gathered in My name, there am I." Matt. 6:18, 20.

That the questions raised are substantial is shown by the following quotations from opinions of this Court:

Everson v. *Board of Education,* 330 U.S. 15, 16:

> "The 'establishment of religions' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

McGowan v. *Maryland,* 366 U.S. 442:

> "It (this Court) has found that the First and Fourteenth Amendments afford protection against religious establishments far more extensive than merely to forbid a national or state church."

The Court then quoted the above opinion in the *Everson* case. This opinion was reaffirmed in *Torcasso* v. *Watkins,* 367 U.S. 492, 493; in *McCollum* v. *Board of Education,* 333 U.S. 203, and in *Abington* v. *Schempp,* 374 U.S. 217. In *Abington* the concurring opinion of Douglas, J. included:

> "The most effective way to establish any institution is to finance it" (p. 229).

Finally, *Everson* v. *Board of Education,* 330 U.S. 31, 32:

> "The Amendment's purpose was . . . to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."

CONCLUSION

The motion to dismiss the appeal should be denied.

June 9, 1969.

Respectfully submitted,

FREDERICK WALZ
Appellant pro se

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 135

FREDERICK WALZ,

Appellant,

—v.—

TAX COMMISSION OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

FREDERICK WALZ
Appellant pro se
60 East 42nd Street
New York, N. Y. 10017

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IN THE

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OCTOBER TERM, 1969

No. 135

FREDERICK WALZ,

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Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

Opinions Below

The opinion of the New York Court of Appeals is reported in 24 N. Y. 2d 30, and its text is set forth in Appendix B of the Jurisdictional Statement. The Appellate Division decision is officially reported in 30 A. D. 2d 778, and the text of the order of affirmance is set forth in Appendix C (p. 6a) of the Jurisdictional Statement. The memorandum opinion of the Special Term of the Supreme Court is not officially reported and is as follows:

> Upon the foregoing papers this motion by plaintiff for summary judgment against respondent Tax Commission is denied; cross-motion for summary judgment dismissing the complaint is granted. Though the pro-

cedure used by plaintiff is technically infirm, decision is on the merits. Plaintiff, an owner of property, sues to restrain defendant's grant of tax exemption to religious organizations (Sec. 420, R. P. Tax L.) as in contravention of the first and fourteenth amendments of the Constitution of the United States. No allegation is made that defendant proceeded otherwise than pursuant to law; rather, it is the law itself which is under attack. Such exemptions are granted in pursuance of long-standing, public policy of this State, under a statute which is presumptively constitutional, and which is hereby sustained.

Dated: March 5, 1968.

ARTHUR MARKEWICH
J.S.C.

Jurisdiction

This appeal is from the order of the Court of Appeals of the State of New York, dated February 20, 1969, affirming an order of the Appellate Division of the Supreme Court of the State. Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of New York on April 4, 1969. The Jurisdictional Statement was filed May 20, 1969 and probable jurisdiction was noted on June 16, 1969. Jurisdiction on appeal is conferred by 28 U. S. C. Sec. 1257(2).

Statutes Involved

Sec. 420, Subdiv. 1, of the Real Property Tax Law provides in part as follows:

> "Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tracted, charitable, benevolent, missionary, hospital, infirmary, educational, public playgrounds, scientific, literary, bar association, library, patriotic, historical or cemetery purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section" (Appendix p. 20).

Article 16, Sec. 1 of the New York State Constitution provides in part as follows:

> "Exemption from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit" (Appendix p. 20).

Question Presented

Did the Court of Appeals err in holding that the real property tax exemption of religious organizations in New York City is not in violation of the First and Fourteenth Amendments of the federal Constitution?

Statement of the Case

The action was commenced on June 15, 1967, by the service of a summons and verified complaint upon the Tax Commission of the City of New York (Appendix pp. 3-7). The defendant served a verified answer containing three separate and distinct defenses on June 28, 1967 (Appendix pp. 8-10). Thereafter appellant moved under CPLR Secs. 3212-13 for an order striking out defendant's answer and directing the entry of summary judgment for appellant upon the cause of action set forth in the complaint (Appendix pp. 11-16). The appellee opposed the motion and under CPLR Sec. 3211, also requested summary judgment dismissing the complaint (Appendix pp. 17-21). Appellant submitted an affidavit in reply (Appendix pp. 22-23). The Special Term of the Supreme Court denied the appellant's motion for summary judgment and granted the appellee's cross-motion for summary judgment dismissing the complaint. The opinion is set forth on pp. 1-2 hereof.

The Appellate Division unanimously affirmed, without opinion (Appendix p. 30). Upon appeal by appellant to the Court of Appeals of the State of New York, that Court affirmed unanimously, with all but one judge concurring in a per curiam opinion (Appendix pp. 35-39).

In essence, the pleadings relate that appellant is a citizen of the United States and the owner in fee of real property located in the County of Richmond in New York City, designated on the Tax Map as Section 1, Block 198, Lot 210 (10). His complaint is that he is a Christian and not a member of any religious organization; that the tax exemption granted to religious corporations for the tax year

commencing July 1, 1967 "constitutes an involuntary payment by plaintiff to the aforementioned religious organizations in violation of plaintiff's religious freedom" and that said tax exemptions are in violation of the First and Fourteenth Amendments of the federal Constitution.

The Tax Commission answered that the taxable status of real property owned by religious corporations was determined in accordance with the law appertaining thereto and that the appellant was neither aggrieved thereby nor deprived of any rights sufficient to constitute a cause of action (Appendix pp. 5-10).

ARGUMENT

Tax exemptions for property of religious organizations violate the First and Fourteenth Amendments of the United States Constitution.

The only cases cited by the New York Courts in the instant case were by the Court of Appeals. None is squarely in point and each is distinguishable as follows:

People v. *Haring; People* v. *Feitner; Trustees* v. *State of Iowa* and *M. E. Church* v. *Hinton*—all make no reference to the federal Constitution.

Garrett v. *Elmhurst* and *Lundberg* v. *Co. of Alameda* —in both cases the tax exemption benefited the public purpose of education.

General Finance Corp. v. *Archetto*—plaintiff was a "soulless" corporation.

Murray v. *Comptroller*—corporate plaintiff was entitled to the tax exemption of which it complained and the co-plaintiffs were natural persons professing atheism.

Abington v. *Schempp* and *Engel* v. *Vitale*—were "public school compulsory religious service" cases; in the first a single concurring opinion expressed the idea that religious organization tax exemption was constitutional and in the second a footnote to a single concurring opinion suggested the opposite.

In the trial court appellant cited *Everson* (Appendix p. 23) and again in both appellate courts.

The following quotations are from the opinion of this Court in *Everson* v. *The Board of Education,* 330 U. S.:

Page 11, with reference to the adoption of the First Amendment,

"The people . . . reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support or otherwise to assist any or all religions. . . ."

Page 8:

"The First Amendment was made applicable to the states by the Fourteenth" (*Murdock* v. *Pennsylvania,* 319 U. S. 105).

Pages 15-16:

"The 'establishment of religion' clause of the First Amendment means at least this: neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another . . . No tax in any amount, large or small, can be levied to support

any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion . . . New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."

The dissent of four justices in the *Everson* case is quoted from in part, as follows:

Pages 31-2:

The First Amendment's object was "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding any form of public aid or support for religion."

Page 33:

"The prohibition broadly forbids state support, financial or otherwise, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes."

Page 40, referring to Madison:

"In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation. Not even 'three pence' contribution was thus to be exacted from any citizen for such a purpose."

Pages 52-3:

"Legislators are free to make, and courts to sustain appropriations only when it can be found that in fact

> they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small. . . . The great condition of religious liberty is that it be maintained free from sustenance, as also from other interference, by the state."

In *McGowan* v. *Maryland,* 366 U. S. 442:

> "It (this Court) has found that the First and Fourteenth Amendments afford protection against religious establishments far more extensive than merely to forbid a national or state church."

The Court then referred to the "establishment of religion" definition in *Everson* (330 U. S. 15-16).

This opinion was reaffirmed in *Torcasso* v. *Watkins,* 367 U. S. 492, 493; in *McCollum* v. *Board of Education,* 333 U. S. 203 and in *Abington* v. *Schempp,* 374 U. S. 217. In *Abington* the concurring opinion of Douglas, *J.,* included:

> "The most effective way to establish any institution is to finance it" (p. 229).

CONCLUSION

The order of the Court of Appeals of the State of New York should be reversed.

June 21, 1969.

Respectfully submitted,

FREDERICK WALZ
Appellant pro se

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IN THE

Supreme Court of the United States

October Term, 1969

No. 135

FREDERICK WALZ,
Plaintiff-Appellant,
against

TAX COMMISSION OF THE CITY OF NEW YORK,
Defendant-Respondent.

BRIEF *AMICUS CURIAE* BY THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA

THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA, *amicus curiae*

BREED, ABBOTT & MORGAN
Attorneys for the National Council
1 Chase Manhattan Plaza
New York, New York 10005
Tel. No. (212) 944-4800

CHARLES H. TUTTLE
THOMAS A. SHAW, JR.
Of Counsel

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BRIEF *AMICUS CURIAE* BY THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA

All parties have consented in writing to the filing of this brief.

The interest of the National Council of Churches is the direct consequence of the nature of its corporate commitments and of the issue here involved.

The National Council is a membership corporation incorporated in 1950 under the Membership Corporations Law of New York. It is the co-operative agency of thirty-three Protestant and Orthodox religious denominations with an aggregate membership of 42,000,000 throughout the

United States. It is organized exclusively for religious purposes. By its certificate of incorporation it is committed "to promote the application of the law of Christ in every relation of life."

On May 2, 1969, the General Board of the National Council adopted the following as part of its Policy Statement entitled "Tax Exemption of Churches":

> "2. *Tax exemption can be a safeguard of the free exercise of religion.* In the United States, it has been a basic public policy since the founding of the nation to accord to freedom of religion, speech, press and assembly a 'preferred position' at the head of the Bill of Rights. Christians support and affirm this healthful arrangement of the civil order, not solely or primarily for themselves and their churches, but for everyone. Citizens, whatever their beliefs, should likewise appreciate the policy of our society that the free exercise of religion cannot be licensed or taxed by government. Property or income of religious bodies that is genuinely necessary (rather than merely advantageous) to the free exercise of religion should likewise not be taxed. Except for cases where exemption is required to afford equality with other eleemosynary institutions, such exemption should be confined to the essential facilities of the church and to the voluntary contributions of the faithful for the operation of the religious organization."

Obviously, this Statement relates itself to the heart of:

The Question Here Presented

Is the tax exemption granted by Article 16, Section 1, of the New York State Constitution and by Section 420, sub. 1 of the New York Property Tax Law unconstitutional insofar as they (quoting the Tax Law) grant tax exemption for real property owned by a corporation "organized exclusively for religious purposes and used exclusively for carrying out thereupon one or more of such purposes."

The appellant's Jurisdiction Statement thus posed the issue:

> "The appellee, as authorized by Sec. 420, subd. 1 of the Real Property Tax Law and Article 16, Sec. 1 of the New York state constitution, regularly grants exemptions from real property taxation to religious organizations on real property used exclusively for religious purposes.
>
> "In the complaint, and in the subsequent appeals, appellant contended that the aforesaid exemption violates the first and fourteenth amendments of the federal constitution."

The Complaint

The complaint alleges that the plaintiff pays taxes on a plot of land on Staten Island, and that the tax exemption under New York law of religious property used exclusively for religious purposes deprives him of his constitutional "right of religious freedom" and confiscates his property without due process of law.

POINT ONE

The Free Exercise Clause in the First Amendment forbids taxation by the Federal or State governments of houses of worship or of other religious property used exclusively for religious purposes and owned by corporations organized exclusively for religious purposes.

(1) From the earliest times an edifice for Jewish or Christian religious observances has been authoritatively declared as an "House of Prayer for all Peoples." (Isaiah c. 56, v. 7; Luke c. 19, v. 46.) It is in itself a symbol and a part of the religion to which it is dedicated.

State taxation of the sanctuary would be state taxation of the exercise of the religion which centers in it. Thus, it would be taxation of the exercise of a right expressly recognized by the Bill of Rights, and by it guaranteed to be free. In effect it would be state taxation of prayer in the "House of Prayer."

Not since the ordainment of our Constitution has any such tax been imposed by Congress or by any legislature.

In his historic reply to the Danbury Baptist Association, quoted in *Reynolds* v. *United States*, 98 U.S. 145 (1878), Thomas Jefferson said (p. 164):

> "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State."

To this statement by Jefferson the Supreme Court added the comment (p. 164):

> "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured."

And in *Everson* v. *Board of Education*, Mr. Justice Rutledge quotes James Madison as saying "there is not a shadow of right in the general government to intermeddle with religion," and that "this subject is, for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it." (330 U.S. 1, 38, 39.)

Thus, as Jefferson emphasized, the "Free Exercise Clause," no less than the "Establishment Clause," builds and renders secure the "Wall of Separation." Neither the State nor the House of Worship can practice exaction from the other.

(2) The Religious Corporations Law of New York, Section 2, defines a "religious corporation" as "a corporation created for religious purposes," and defines an "incorporated church" as "a religious corporation created to enable its members to meet for divine worship or other religious observances."

The appellant is, in effect, claiming that the fulfillment by such a corporation of its chartered purpose to establish, own and conduct a place for "its members to meet for divine worship" under the protection of the Bill of Rights in both the state and federal constitutions, nevertheless subjects such place to taxation by the nation, state and

locality, and to sale and termination by the secular government in the event of non-payment of the tax.

In paragraph Eighth of his complaint the plaintiff alleges that, although he is "a Christian" he is "not a member of any religious organization as referred to herein, rejecting them as hostile." But religious hostility between Christians is within the very subject which the Free Exercise Clause was intended to exclude from any form of State participation. The government is neutral as between religious opinions and "disparages none." (*Abington School District* v. *Schempp*, 374 U.S. 203, 215 [1963].)

Separation of Church and State, if it is to be meaningful at all, must be bilateral and reciprocal. Neither is to take from the other. Tax exemption of houses of worship is essential to such Separation and is indeed necessitated precisely because of the Free Exercise Clause.

For secular tax assessors, with various personal religious adherences or hostilities, to enter the house of worship professedly to assess for secular tax purposes and enforcement the interior, the altar, its furnishings, the pulpit, the lectern, the baptismal font, the memorial windows, and the other embodiments and exercises of the church's religious faith, would entail intolerable indignity and conflict as to standards and opinions of value.

Latent, and easily ready to surface, would be questions and suspicions of preference of one sect or religious body over another, of the presence of hostility to the particular religious body or to all religion, and of the vast differences between secular and religious values.

The state's power to tax entails the state's power to enforce by seizure and sale, commonly by public auction on the location. "How much am I bid for this church building, or this altar?" In short, the power to substitute the Auction Block for the House of Prayer! The Pandora's Box, which the First Amendment locked, would be unlidded.

(3) This Court has repeatedly noted and emphasized that the rights enumerated in and guaranteed by the First Amendment command "a preferred position" in the Bill of Rights, and that, among such preferred rights, the first in order is the guarantee of the separation of church and state.

The source of this eminence is the historic truth recognized repeatedly by this Court from the earliest times that "this is a religious people" and that "no purpose of action against religion can be imputed to any legislation" (*Holy Trinity Church* v. *United States,* 143 U.S. 457, 465 [1892]). "We are a religious people whose institutions presuppose a Supreme Being" (*Zorach* v. *Clauson,* 343 U.S. 306, 313-4 [1952]). "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind" (*Abington School District* v. *Schempp,* 374 U.S. 203, 226 [1963]).

As regards the State, religion is inviolable.

(4) A decision in point *a fortiori* is *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943).

There, in the exercise of its police power the city of Jeannette, Pennsylvania, enacted an ordinance that "all

persons canvassing for or soliciting orders for goods, paintings, pictures, wares or merchandise of any kind" should be required to obtain a license. The obvious purpose of the ordinance was to protect the householder from the dangers in opening doors to promiscuous would-be vendors or solicitors. Jehovah's Witnesses challenged as unconstitutional the *application* of the ordinance to their going about from door to door distributing their religious literature, soliciting purchases of their religious books, and using a phonograph to voice to the householder their religious views. None applied for a license. Their convictions were sustained by the Pennsylvania courts but were reversed by this Court with an opinion written by Mr. Justice Douglas which was at pains to say (p. 110) that the single issue was "the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities." In holding that the Free Exercise Clause constituted an overriding exception to the application of the ordinance to such religious colporteurs, this Court said (p. 113):

> "It is a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. * * * The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down."

And again (p. 112):

> "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. *Magnano*

Co. v. *Hamilton,* 292 U.S. 40, 44-45, and cases cited. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation."

The taxation of church edifices used exclusively for religious purposes would even more obviously be "a flat tax imposed on the exercise of a privilege granted by the Bill of Rights," or, to put it more emphatically, on a right older than the Bill of Rights and guaranteed by it.

Obviously also the taxation of church edifices could close their doors or cause them to be sold, or prevent their erection where those seeking this exercise of their religion "do not have a full purse." The House of Worship would cease to be a House of Prayer attainable by all people and would be attainable (if at all) only where there were sufficient "resources necessary for its maintence." Even for those with resources, taxation could restrict and forbid the free exercise of religious observances and activities. The employment of adequate or acceptable pastoral leadership could be jeopardized or inhibited. Yet the poor's free heritage in religion has always been deemed and proclaimed one of religion's greatest glories (Isaiah, c. 29, v. 19; Matthew, c. 11, v. 5). The poor as well as the rich are entitled to full and equal religious freedom and the privi-

leges and means of its exercise. They are not to be dependents of, and second class members in, the congregations of the rich.

Also worthy of quoting from the *Murdock* case is the following (p. 115):

> "The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, *freedom of religion are in a preferred position.*" (Italics are ours.)

Equally so this taxation of church edifices "does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with" all real estate.

Contemporaneous with the decision of this Court in this *Murdock* case was its decision in *Jones* v. *Opelika,* 319 U.S. 103 (1943) where the issues "were of the same character."

Also the *Murdock* decision was later reaffirmed by this Court in *Follett* v. *McCormick,* 321 U.S. 573 (1944). There the town of McCormick, South Carolina, had an ordinance similar to that in the *Murdock* case. The appellant before this Court was a resident of McCormick and an ordained minister of the Jehovah's Witnesses. "He obtained his living from the money received" by going from house to

house distributing and selling religious books. He had no other source of income. The state court had distinguished his case from the *Murdock* and *Opelika* decisions on the ground that Follett was not an itinerant but was a resident of the town and was making his living by selling books from door to door. Because of the Free Exercise Clause this Court nevertheless reversed the conviction on the ground that these distinctions were not valid in constitutional consequence. To quote (pp. 576-7):

> "Freedom of religion is not merely reserved for those with a long purse. Preachers of the more orthodox faiths are not engaged in commercial undertakings because they are dependent on their calling for a living. Whether needy or affluent, they avail themselves of the constitutional privilege of a 'free exercise' of their religion when they enter the pulpit to proclaim their faith. *The priest or preacher is as fully protected in his function as the parishioners are in their worship.* A flat license tax on that constitutional privilege would be as odious as the early 'taxes on knowledge' which the framers of the First Amendment sought to outlaw. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 245-248." (Italics are ours.)

(5) These decisions, we submit, go well beyond what is necessary for the decision of the present case.

The ordinances there involved were well within the police power of the municipality for the safety of its residents and their property. They were secular in their wording and expressed no discrimination for or against any religious activity. Nevertheless, this Court held that their *application* to the described particular religious activities, although similar to merchandising and pecuniary

in character, was proscribed by the Free Exercise Clause. This Court expressly interpreted that Clause as extending to such activities the same protective exemption from taxation as it expressly took for granted and declared applicable to "worship," the assembling for worship, and the preaching of "sermons" in established houses of prayer.

In his concurring opinion in the *Follett* case Mr. Justice Murphy said (321 U.S. 573, 579):

> "We are not called upon in this case to deal with the taxability of income arising out of extensive holdings of commercial property and business activities related thereto. There is an obvious difference between taxing commercial property and investments undertaken for profit, whatever use is made of the income, and laying a tax directly on an activity that is essentially religious in purpose and character or on an exercise of the privilege of free speech and free publication.
>
> "It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds."

In his opinion in *McGowan* v. *Maryland,* 366 U.S. 420 (1961), Mr. Justice Frankfurter said (pp. 462-3) of the *Murdock, Opelika* and *Follett* decisions that they rejected as unconstitutional the application of the levy imposed by the ordinances to "an activity which in the light of history could reasonably be viewed as *sacramental.*" (Italics ours.) Even more so must a levy upon a house of worship and the ground upon which it stands be viewed as an unconstitutional levy imposed upon "an activity which

in the light of history could reasonably be viewed as sacramental." What could be viewed more so?

(6) Houses for the assembly of people to worship and to hear the Gospel of their religious faith are essential to the free exercise of the religious belief of all the principal religious communions. The Founders themselves were participants in the religious "meeting houses."

For the State to tax such religious houses and the ground which furnishes their foundation is in essence to tax the religion of which they are an essential part and an evangelistic expression and exercise.

A church or temple is in itself a proclamation of religious faith and conviction, an act and manifestation of evangelism, and an invitation and exhortation to all to give place in their lives to religious belief and the exercise thereof. In its very presence in the community the church or temple is as symbolic and potent a public exercise and proclamation of religion as is the display of the flag of our country a symbolic and potent public exercise and proclamation of its constitutional ideals.

In *Sherbert* v. *Verner,* 374 U.S. 398 (1963), South Carolina's Unemployment Compensation Act denied eligibility for its benefits if, without good cause, the claimant had refused to accept available suitable work when offered him. Sherbert, a member of the Seventh Day Adventist Church, refused to work on Saturday, the Sabbath Day of her faith. Because of this refusal her employer discharged her. The state commission and the state court denied her application for unemployment compensation. This Court

reversed on the ground that the state's denial of her eligibility violated her constitutional rights under the Free Exercise Clause. To quote (pp. 404-5):

> "The ruling (below) forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. * * * It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. *American Communications Assn.* v. *Douds*, 339 U.S. 382, 390; *Wieman* v. *Updegraff*, 344 U.S. 183, 191-192; *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 155-156."

The special pertinency of this case is in the fact that this Court held irrelevant as against Sherbert's right to the exercise of her religious belief the claim of South Carolina that its legislation neither contained nor expressed anything anti-religious, and that it was merely non-discriminatory social regulation of a subject of general application "within the State's constitutional power to regulate" (p. 403). This Court's decision had the obvious secular effect (evidently deemed by it to be irrelevant) that the taxpayers of the state were required to provide Sherbert with unemployment benefits which, but for her religious scruple, would not be due her.

In *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), this Court said (pp. 493-4):

> "We are all agreed that the First and Fourteenth Amendments have a secular reach far more pene-

trating in the conduct of Government than merely to forbid an 'established church.' * * * We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.' "

Essential to that "complete separation" is the exemption of the house of worship from all efforts by the state to exact money from it,—efforts which, if permissible, would have the consequence of power in the state to encumber, terminate or alienate it and dispossess the worshippers, if such exactions are not punctually paid in full or cannot be.

POINT TWO

The decisions cited by the appellant have no bearing on the actual issue here.

(1) The appellant's brief neither quotes nor discusses the Free Exercise Clause.

Its argument proceeds as if that exalted and comprehensive Clause were not in the Constitution at all. It bases itself solely on decisions concerning legislation appropriating public funds for the support or aid of religious activities, beliefs or institutions. Those decisions relate themselves to the Establishment Clause.

But here no state appropriation of state moneys is at issue. Hence to argue from such decisions is the spinning of irrelevance and a *non sequitur*.

Appellant's argument reduces itself to the ultimate proposition that, if the state taxes any class of real prop-

erty, it is constitutionally compelled to tax the house of worship.

The freedom of the house of worship from taxation is not a violation but a protection of the First Amendment and of a basic bulwark of our freedom.

The First Amendment is in perfect balance. It forbids the State to give to or take from the Church.

The opening of a door for any such compulsory takings by the State would be the beginning of the end of the whole constitutional concept of the Separation of Church and State. The moment the State enters the Church to take for itself money or property given, acquired and held exclusively for the Church's religious purposes therein, the freedom of the Church from intermeddling by the State is lost.

(2) According to the same argument as is used by appellant here, a State is constitutionally compelled to include in its *personal property tax* the cross, the chalice, the seven-branched candlestick, and the Holy Bible in the chancel. It must interest itself in the value of the baptismal font and the memorial windows. It must sit with the Church's representative while the money in the collection plate is being counted. It must demand and exact its "cut."

To quote again from the opinion of this Court in the foregoing *Murdock* case (319 U.S. 105, 112):

> "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."

The Free Exercise of Religion is a corollary from the Freedom of Conscience. Hence it is much more than a "privilege." It is a fundamental personal and constitutional "right,"—*the very highest.*

(3) The Church is not a creature or permittee of the State. It does not derive its authority from the State.

The Church is older than the State,—indeed as old as Man.

As said by this Court in *Engel* v. *Vitale,* 370 U.S. 421, 434 (1962):

> "The history of man is inseparable from the history of religion. And * * * since the beginning of that history many people have devoutly believed that 'More things are wrought by prayer than this world dreams of.'"

Thus, the position of the Church in our society is unique, and the constitutional wall of separation between the State and the Church is also unique—no other institution (including, for example, the Press) is thus excluded by fundamental law from grants of public funds. But the Framers were as fair as they were wise—the Establishment Clause forbids the flow of tax funds to the Church, while the Free Exercise Clause forbids the exaction of taxes from the Church.

As Madison wrote of Church and State (quoted at 330 U.S. p. 40):

> "The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between

them, will best be guarded agst. by an entire abstinence of the Govt. from interference *in any way whatever*, beyond the necessity of preserving public order, & protecting each sect agst. trespasse on its legal rights by others." (Emphasis supplied.)

In *Thomas* v. *Collins*, 323 U.S. 516 (1944), this Court emphasized (p. 530) "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment," and then said (p. 530):

> "That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions."

Note: This brief's discussion of the Free Exercise Clause is not intended as disagreement with or disparagement of the discussion in other defense briefs of the Establishment Clause.

Conclusion

The disposition by the courts below should be affirmed.

Respectfully submitted,

THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA, *amicus curiae*

BREED, ABBOTT & MORGAN
Attorneys for the National Council
1 Chase Manhattan Plaza
New York, New York 10005
Tel. No. (212) 944-4800

CHARLES H. TUTTLE
THOMAS A. SHAW, JR.
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1969

No. 135

FREDERICK WALZ,
Appellant,
v.
TAX COMMISSION OF THE CITY OF NEW YORK,
Appellee.

BRIEF *AMICUS CURIAE* OF THE EPISCOPAL DIOCESE OF NEW YORK AND THE CHURCH OF THE HOLY APOSTLES

ANTHONY L. FLETCHER
c/o Simpson Thacher & Bartlett
120 Broadway
New York, New York 10005
Counsel for the Episcopal Diocese of New York and the Church of the Holy Apostles

THE GUILD OF ST. IVES
Stephen B. Clarkson
Rev. Walter D. Dennis
John Miles Evans
Anthony L. Fletcher
John F. Geer
Robert F. Gibson, III
Grant B. Hering
Rev. Francis C. Huntington
George F. Mackey
Stoddard Platt
Samuel Polk
Rev. James Proud, Esq.
William G. Rhines
Rev. Neale Secor, Esq.
William Sherman
H. Richard Schumacher
Floyd Tomkins, Jr.
Bradley Walls
Thomas Wright

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BRIEF *AMICUS CURIAE* OF THE EPISCOPAL DIOCESE OF NEW YORK AND THE CHURCH OF THE HOLY APOSTLES

Interest of *Amici Curiae*

The Protestant Episcopal Church in the Diocese of New York is that part of the Protestant Episcopal Church in the United States of America located in the State of New York in the Counties of Richmond, New York and Bronx (all in New York City) and Westchester, Dutchess, Putnam, Ulster, Sullivan, Orange and Rockland. It includes more than 200 congregations organized into parishes and missions. In New York City it includes 67 parishes, one of them the Church of the Holy Apostles, each of them organ-

ized and existing under the New York Religious Corporations Law or else under a prior royal or colonial charter and each owning real estate in New York City currently tax exempt by virtue of the New York State constitutional and statutory provisions challenged in this appeal. Consent to filing this brief on their behalf has been given by the parties to this case.

Constitutional Provisions and Statute Involved

The First Amendment to the United States Constitution provides, in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *"

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "* * * No State shall * * * deprive any person of * * * property without due process of law * * *"

Article VI of the United States Constitution provides, in pertinent part:

> "This Constitution * * * shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Article XVI, Section 1, of the present New York State Constitution* provides, in pertinent part, as follows:

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* New York State Constitutions are more ephemeral than that of the United States. The first was adopted in 1777 without a vote of the people. There have been general revisions in 1821, 1846, 1894 and 1938, plus amendments from time to time. Another general revision was rejected by the voters in 1967. See, *e.g.*, McKinney's [N.Y.] Const., vol. 1, pp. vii-viii (1969).

"Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit."

Section 420 [1] of the New York State Real Property Tax Law provides, in pertinent part:

"Real property owned by a corporation or association organized exclusively * * * for religious, bible, tract, charitable, benevolent, missionary, * * * or cemetery purposes, * * * or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes * * * shall be exempt from taxation * * *"

Question Presented

Is the tax exemption granted to religious organizations with respect to real property used for religious purposes a law either (i) respecting an establishment of religion, or (ii) prohibiting the free exercise of religion, contrary to the Constitution of the United States?

Statement of the Case

Appellant and his claim. Appellant is the owner of a parcel of real property located in Staten Island in New York City.* Appellant commenced an action in New York State Courts in June of 1967 against the Tax Commission

* It has been reported to be a weed-filled 22 foot by 29 foot plot near a junkyard, valued at $100 and taxed at the rate of $5.24 per year. *To Tax—Or Not?*, Newsweek, July 14, 1969, p. 57.

of the City of New York challenging the constitutionality of the New York State tax exemption of real property owned by religious organizations and used for religious purposes. On motion of the Tax Commission, the action was dismissed, and that dismissal was affirmed twice on appeal within the state courts.

Appellant alleged that he is a Christian, but not a member of any religious organization, and that the real estate tax exemption granted religious organizations for property used for religious purposes constituted an involuntary payment by appellant to such religious organizations in violation of his right of religious freedom, and therefore was a confiscation of his property without due process of law.

The tax exemption in question has been afforded by New York since 1829 or earlier (see N.Y. Rev. Stat. 1829, Ch. XIII, Tit I, §4 [3]), and generally in this country since colonial times.*

Tax Exempt Property in New York City. At the time appellant commenced this action, 67% of the real property in New York City was taxable (down from 71.4% in a decade), and the rest was tax exempt. Real estate taxes amounted to 34.07% of the City's total expense budget (down from 45.64% in a decade).**

* See, *e.g.*, Note, *Constitutionality of Tax Benefits Accorded Religion*, 49 Colum. L. Rev. 968, 969 (1949); *Lundberg* v. *County of Alameda*, 46 Cal. 2d 644, 654, 298 P. 2d 1, *appeal dismissed sub nom. Heisey* v. *County of Alameda*, 352 U.S. 921 (1956).

** *Real Estate Tax Exemptions in New York City: A Design for Reform*, Citizen's Budget Commission, Inc., New York, New York, 1967, p. 9.

The total value of all tax exempt property in New York City at that time has been calculated at $15,665,114,130,* which if taxed at the then current city-wide basic real estate tax rate, .04957%,** would, if the taxes were fully collected, have resulted in added revenues of $776,519,707. The value of the real property in New York City which was tax exempt because of its religious ownership and use was $698,339,020,† which, if taxed at the same rate (and if the taxes had been fully paid), would have produced $34,617,662 of added revenues per annum. Religious property is therefore about 4½% of the tax exempt property in New York City, 1½% of the total property in New York City.

Owners of tax exempt housing ($2.1 billion), the City Department of Parks ($1.5 billion), the New York City Transit Authority ($1.4 billion), the City Board of Education and Higher Education ($1.4 billion), the City Department of Public Works ($1.3 billion), the Department of Marine and Aviation (971 million), and the combined hospital-health establishment ($1.0 billion)—each then owned more tax exempt property in New York City than do all religious organizations together. The combined religious organizations own more tax exempt property than nearly fifty other classes of tax exempt property owners, including such diverse groups as the Little League, Bar Associations, the Veterans of Foreign Wars, the Scouts and the Army. (A list of the classes and amounts of tax exempt property in New York City during the 1966-67 fiscal year appears as an Appendix hereto.)

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* *Id.*, pp. 26-9, 34-7, 40, 44, 46.

** *Id.*, p. 4.

† *Id.*, p. 26.

Similar information on a State and national scale would presumably also be relevant; we know of no reliable source or compilation of it, however.

Consequences of Taxing Religious Property. Appellant appears to have alleged that if it were not for the tax exemption of religious property, his real estate taxes would be lower.* There is no evidence to support this conclusion, and the possibility of such a result at this time in New York (or almost any other) City seems extraordinarily unlikely. It seems far more likely that if there were no such exemption appellant's real estate taxes would be just as high, and the total tax revenues increased by the amount of that part of the present exemption which could be collected to offset additional spending. It is a matter of common knowledge and experience that municipal, state (and even Federal) "needs" for revenue are greater than, and growing faster than, sources of revenue.

On the other hand, the impact of the loss of the exemption on religious organizations would be considerable:

1. Some religious organizations would be unable to continue; most of those would be likely to be engaged in ministries in poorer areas, where their presence is an important factor to the political, social and economic health of such communities. (This, presumably, would accelerate the trend, for better or for worse, among many, especially the young, to take their religious, and to some extent social, activities underground and outside established channels of control and action.)

2. Most would be expected to survive, but they would probably find it necessary to abandon some par-

* If all other real estate taxes were reduced proportionately by the amount which would theoretically be collected if all exempt religious property were fully taxed at the same rate, appellant would, we calculate, realize tax savings of about 11¢ per year.

ticularly valuable, and therefore most heavily-taxed, properties which are currently used little or primarily by the poor. (A complicating factor here is that some are city-designated landmarks.)

3. Non-religious services now provided by organized religion on a non-profit basis, such as the operation of schools, hospitals, clinics and counselling services, would probably have to be curtailed, and perhaps eliminated. A financially hard-pressed religious organization facing economic hardship could be expected to preserve its place and program of worship, and sacrifice its activities not specifically religious in nature. Presumably, some of these other social and community services would have to be assumed by government, probably at significantly greater cost. (For example, in New York City, parochial schools educate about 250,000 students, roughly 25% of the number educated by the public school system; the parochial school system is in a state of crisis, and is heavily subsidized by the church.* Taxing the Roman Catholic churches in New York City will almost surely result in a massive dislocation of parochial school students, dispersing many into the City's beleaguered public schools. The cost to the City of this alone could well exceed the added tax revenues.)

In brief summary, the relief sought by appellant would not only create an emotional furor across the nation, it would seem certain to also bring about a substantial— perhaps drastic—dislocation of many of society's resources.

* See Greenhouse, *Do the Parochial Schools Have a Prayer Next Fall?*, New York, vol. 2, No. 27, July 7, 1969, pp. 26-29. (Our own telephonic inquiries suggest the number of parochial school students in New York City is nearer 350,000.)

However desirable such a reallocation might be for some, it seems clear that society as a whole has neither considered, nor prepared itself for, such a result or its consequences.

ARGUMENT

POINT I

The tax exemption of property owned by religious organizations is not within the purposes of the proscriptions of the First Amendment.

The whole issue of the propriety of tax exemptions—real property, personal property, investment income, sales and excise—to religious organizations—as well as benevolent, fraternal, education and charitable ones—is extraordinarily difficult of solution. Practically none of the investigation, study and solicitation and consideration of diverse viewpoints necessary to resolve it has yet been done. Not only is it an extraordinarily complicated issue merely in economic terms, it is also an emotion-laden one.* The answer, we submit, neither should be nor is a Constitutional absolute. In reaching this conclusion, at least two canons of Constitutional construction are relevant and, we submit, determinative.

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* *Cf.* "What renders cases of this kind non-justiciable is not necessarily the nature of the parties to them, for the Court has resolved other issues between similar parties; nor is it the nature of the legal question involved, for the same type of question has been adjudicated when presented in other forms of controversy. *The crux of the matter is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums,* by which governments and actions of governments are made and unmade." Mr. Justice Frankfurter, dissenting in *Baker* v. *Carr,* 369 U.S. 186, 287 (1962), emphasis added, footnotes omitted.

A. The Constitution Implicitly Contemplates the Tax Exemption of Religious Property

"Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written." *United States* v. *South-Eastern Underwriters Association,* 322 U.S. 533, 539 (1944).

As was noted in *Murray* v. *Comptroller of Treasury,* 241 Md. 383, 216 A.2d 897, *cert. denied* 385 U.S. 816 (1966):

"That the states do not believe tax exemption of the property of religious institutions violates any constitutional prohibition is evident. Constitutional or statutory provision for such exemption exists today in every state and the District of Columbia. 'This history cannot be explained solely as a carryover from the earlier days of established churches. These exemptions are found also in states formed and organized after churches had been disestablished in the colonial states. In many states they have also been recently amended to extend the scope of the exemption. This suggests a rationally conceived and deep-seated policy, and not an accidental or vestigial survival of outmoded practices.' Kauper, *The Constitutionality of Tax Exemption for Religious Activities* in 'The Wall Between Church and State,' 95, 110 (Oaks ed. 1963).

It is true that the protection of individual rights guaranteed by the federal Bill of Rights is not dependent upon majority approval. It is also true that the historical argument, while it casts some light, is not conclusive. * * * Nevertheless, in the words of Mr. Justice Holmes, '(i)f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect

> it.' *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922).[*] It is significant, in our opinion, that the act exempting church property in the District of Columbia from taxation * * * was first adopted in 1802 by the corporation of the City of Washington * * * under authority delegated by Congress * * *, approximately eleven years after the adoption of the first ten amendments. Congress thereafter amended the act incorporating the City of Washington but permitted the exemption to remain * * *. It seems a reasonable assumption that members of the Congress in the early years of the nineteenth century were personally familiar with the purposes and scope of the First Amendment, and did not regard the exemption as inconsistent therewith." 241 Md. at 400-01, 216 A.2d at 897, footnote omitted.

Similarly, it seems a reasonable assumption that a practice widely countenanced at the time of the enactment of the Constitution,** continuing to the present day on an uninterrupted basis, and until recently seldom if ever questioned, is constitutional. Indeed, this Court or a member of its majority has so indicated (though not expressly held) at least twice.

In upholding a state tax on the face, rather than actual, value of lands, the Court unanimously stated:

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* There are several minor discrepancies between the texts of the official and unofficial (West) reports of this case. In this passage, the official text has been followed except in the actual quote of Mr. Justice Holmes, the unofficial text has been followed because it correctly reflects the text of the original source.

** "Probably at the time of the adoption of the Constitution, and of the [First] amendment to it * * *, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions and make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation." 2 Story, Commentaries on the Constitution, §1874 (1905).

"But be this as it may, the law does not make any discrimination in this regard which the State is not competent to make. * * * The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. *It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions.* * * * All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution." *Bell's Gap Railroad Co.* v. *Pennsylvania,* 134 U.S. 232, 237 (1890), emphasis added.

And, as Mr. Justice Brennan, concerning *Abington School District* v. *Schempp.* 374 U.S. 203 (1963) said:

"Nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share benefits which government makes generally available to educational, charitable and eleemosynary groups. There is no indication that taxing authorities have used such benefits in any way to subsidize worship or foster belief in God. And as among religious beneficiaries, the tax exemption or deduction can be truly non-discriminatory, available on equal terms to small as well as large religious bodies, to popular and unpopular sects, and to those organizations which reject as well as those which accept a belief in God." 374 U.S. at 301-02, footnotes omitted.

And see the dissent in *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), of Mr. Justice Reed, who became a member of the majority in *Zorach* v. *Clauson*, 343 U.S. 306 (1952):

> "* * * Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people. This is an instance where, for me, the history of past practices is determinative of the meaning of a constitutional clause, not a decorous introduction to the study of its text. * * *" 333 U.S. at 256.

B. The Constitution Was Never Intended to Affect the Tax Exemption of Religious Property

> "* * * In the construction of the constitution, we must look to the history of the times, and examine the state of things existing when it was framed and adopted * * *, to ascertain the old law, the mischief and the remedy. * * *" *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838).

See, similarly, Bradley, J. concurring in *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 560 (1870); *Maxwell* v. *Dow*, 176 U.S. 581, 602 (1900); *Brushaber* v. *Union Pacific R.R.*, 240 U.S. 1, 12 (1916).

What gave rise to the First Amendment* has been cogently stated by this Court:

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* It seems plain that the Fourteenth Amendment is involved in this case only insofar as it incorporates the provisions of the First. See *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). It is established that tax exemptions are not violative of the Fourteenth Amendment *per se*. *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495 (1937).

> "* * * The first amendment to the Constitution * * * was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they imposed as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the amendment in question." *Davis* v. *Beason*, 133 U.S. 333, 342 (1890).

Neither exemption from taxation nor taxation of the property of religious organizations (so long as neither is discriminatory) has any effect on appellant's (or any one else's) freedom to pursue or deny any religion he wishes to or tends in any way whatever to force him to conform, even outwardly, to the tenets of any religion.

If the First Amendment were to be held to prohibit the exemption from taxation of property used for religious purposes, it would be given a whole new meaning, contrary to its intent and meaning at the time of its adoption.*

---

* We note that while Constitutional provisions are sometimes given meanings not originally intended because unforeseen situations have arisen in the interim, this is not such a case; the practice here challenged was prevalent at the time of the First Amendment.

POINT II

The tax exemption of property owned by religious organizations is not within the proscriptions of the First Amendment.

> "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. * * *" Northwest Ordinance of 1787, art. III.
>
> "We are a religious people whose institutions suppose a Supreme Being. * * * We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities * * *, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. * * *" *Zorach* v. *Clauson*, 343 U.S. 306, 313-14 (1952).
>
> "* * * The proliferation of tax benefits to churches thus must be regarded in part, at least, as a manifestation of a political consensus that aid to organized religion, in nondiscriminatory form at least, has a special tendency to enhance (to use John Stuart Mill's phrase) 'The first element of good government * * * to promote the virtue and intelligence of the people themselves.'" Van Alstyne, *Tax Exemption of Church Property*, 20 Ohio St. L.J. 461, 462-63 (1959).

The tax exemption of property used for religious purposes is a reflection of the fact that we are a religious people. It recognizes the value of this historic fact, and

is an accommodation by the taxing authority of those purposes. The exemption applies equally and evenly to all religions. Undoubtedly, the religious organizations benefit from such tax exemptions (just as do educational institutions, hospitals and a variety of other organizations generally, and reasonably, believed to be beneficial to the common good). They benefit by not being required to pay taxes on property freely given by members for use by such organizations for religious purposes. But such tax exemptions are not constitutionally proscribed.

A. Tax Exemptions of Religious Property Are Not Laws Respecting an Establishment of Religion.

Webster's Second International Dictionary defines the verb "establish" as follows: The first meaning is "To make stable or firm; to fix immovably or firmly; to settle; confirm." The second is "To appoint or constitute for permanence * * *." The third is "To originate and secure the permanent existence of; to found; to institute; to create and regulate * * *." The fourth is not in point. The fifth is "To set up in business; to place advantageously in a fixed condition * * *." The sixth is "To make a national or state institution of (a church)." The seventh and eighth are not pertinent. (Webster's Third International, though perhaps less widely accepted, does not differ substantially.) "Establish," then is a word of several similar meanings denoting fixity, immovability, permanence and institutionalization. What is significant is that none of them comprehends the effect of tax exemption of religious property.

Similarly, and significantly, the same source shows that an "established church" is "A church supported by a civil

authority; a state church * * *.'"* To our knowledge, there is no such established church in New York City (or elsewhere in the United States); no tax exemption has any such effect. All religions are dealt with equally, and none is favored in any way.

What it takes to establish a religion is faily simple to define, but difficult to achieve: an enduring faith on the part of its adherents. Property and money assist, incidentally, in the free exercise of that faith. Tax exemptions certainly do not provide faith. Nor do they provide property or money; they have the effect of preserving some of the property and funds donated by the faithful, but they do not provide the property or funds. No religion (or anything else, for that matter) has ever been or can be established by a tax exemption, for a tax exemption is nothing until the religion is already "established."

This distinction is overlooked by those who equate tax exemptions with grants (*e.g.* Note, *Constitutionality of Religious Tax Benefits,* 49 Colum. L. Rev. 968, 985). If appellant received a grant from the State for his own religion, he could (depending on its size), build a monument, shrine or even a cathedral with it, if he so chose. He could do none of these things with his tax exemption however; it would only be after he had done so himself that he could receive such an exemption, and even then it would not suffice to maintain either the physical manifestations of his religion or the religion itself—that would require still further funds and faith from the faithful.

---

* "By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others. It was never intended by the constitution that the government should be prohibited from recognizing religion, * * * where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects." Cooley, *Principles of Constitutional Law,* 224-25 (3d Ed. 1898), footnote omitted.

B. Tax Exemptions of Religious Property Do Not Restrain the Free Exercise of Religion.

Appellant, like every other citizen of the United States, is entirely free to worship or not worship any God or other Supreme Being or lesser entity or absence of same in any manner, at any time, and to whatever extent he desires. The tax exemptions accorded the property or religious organizations in New York City restrain that right no more than the tax exemptions afforded Columbia University restrict his right to seek education and information from any other source within or without the city.

Conclusion

For the reasons stated above, the judgment of the Court of Appeals of the State of New York should be affirmed.

Respectfully submitted,

ANTHONY L. FLETCHER
c/o Simpson Thacher & Bartlett
120 Broadway
New York, New York 10005
Counsel for the Episcopal Diocese of New York and the Church of the Holy Apostles

THE GUILD OF ST. IVES
Stephen B. Clarkson
Sullivan, Shea & Kenney
Washington, D. C.
Rev. Walter D. Dennis
Cathedral Church of St. John the Divine, New York, New York

John Miles Evans
Cadwalader, Wickersham & Taft
New York, New York

Anthony L. Fletcher
Simpson Thacher & Bartlett
New York, New York

(Continued on next page.)

John F. Geer
Parr, Doherty, Polk & Sargent
New York, New York

Robert F. Gibson, III
Palmer & Serles
New York, New York

Grant B. Hering
Cadwalader, Wickersham & Taft
New York, New York

Rev. Francis C. Huntington
The Wall Street Ministry
New York, New York

George F. Mackey
Jarvis & Pilz
New York, New York

Stoddard Platt
Department of Ports & Terminals
New York, New York

Samuel Polk
Milbank, Tweed, Hadley & McCloy
New York, New York

Rev. James Proud, Esq.
New York, New York

William G. Rhines
Huyck Corp.
Stamford, Connecticut

Rev. Neale Secor, Esq.
St. Mary's Church
New York, New York

William Sherman
Schlumberger, Limited
New York, New York

H. Richard Schumacher
Cahill, Gordon, Sonnett,
Reindel & Ohl
New York, New York

Floyd Tomkins, Jr.
Cadwalader, Wickersham & Taft
New York, New York

Bradley Walls
Burns & Van Kirk
New York, New York

Thomas Wright
The Ford Foundation
New York, New York

Appendix

Categories and Valuations of Tax Exempt Real Property in New York City for Fiscal Year 1966-1967*

CITY PROPERTY

Department of Parks	$ 1,531,320,735
Bd. of Education & Higher Ed.	1,451,870,300
Dept. Public Work	1,272,127,925
Dept. of Marine & Aviation	971,484,500
Dept. of Highways	665,716,250
Dept. Water Supply, Gas & Electricity	564,139,005
Dept. of Hospitals	315,597,600
Libraries and Museums	101,281,725
Dept. of Sanitation	90,997,170
Dept. of Welfare	84,129,900
Dept. of Traffic	56,921,800
Dept. of Markets	51,534,000
Dept. of Correction	49,791,000
Fire Department	45,888,550
Dept. of Real Estate	34,396,215
Police Department	24,410,100
Dept. of Health	22,473,600
Armories	17,206,000
Borough Presidents	4,515,588
Subtotal	$ 7,355,801,963

* Derived from *Real Estate Tax Exemption in New York City: A Design for Reform,* Citizen's Budget Commission, Inc., New York, N. Y. 1967, pp 26-9, 34-7, 40, 44, 46, 53, 56.

Non-Governmental Property	
Religious	$ 698,339,020
Education	661,225,470
Hospitals, Infirmaries, Dispensaries	496,219,600
Railroads	251,706,996
Veterans	192,479,320
Cemeteries	159,769,160
Asylums & Homes	84,973,750
Charitable	73,079,900
Mental, Moral, Fire & Benev. Assns., Charitable	66,006,300
Alterations & Fall-Out Shelters	29,278,450
Professional	17,216,200
Library	6,015,000
Historical	3,836,400
Veterans Organizations	3,307,350
Fire Association	208,000
Subtotal	$ 2,743,660,916
Exempt Authorities	
New York City Transit	$ 1,369,761,450
Triborough Bridge & Tunnel	686,909,270
Port of New York	441,785,700
Long Island R.R.	72,691,655
South Brooklyn R.R.	3,489,200
Subtotal	$ 2,574,637,275
Tax Exempt Housing	
Federal, State, City Aided, etc.	$ 2,151,401,721
Subtotal	$ 2,151,401,721

Appendix

United States Property	
Army	$ 158,233,800
Navy	132,380,800
Government Land & Buildings	87,655,700
Post Office	80,549,300
Hospitals	55,413,300
Cemeteries	577,500
Light Houses	101,500
Subtotal	$ 514,911,900
State of New York Property	
Hospitals	$ 125,172,900
State Lands & Buildings	61,118,350
Public Works	20,298,605
Dormitory Authority	15,620,000
Armories & Arsenals	12,760,500
Labor Department	615,000
Subtotal	$ 235,585,355
United Nations and Foreign Goverment Property	
United Nations	$ 88,000,000
Foreign Governments	1,115,000
Subtotal	$ 89,115,000
Total	$15,665,114,130

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 135

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Appellant,

v.

TAX COMMISSION OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
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BRIEF OF THE STATE OF NEW YORK JOINED BY THE STATES OF ALABAMA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, VIRGINIA, WASHINGTON, WISCONSIN AND WYOMING, AS *AMICI CURIAE*

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JULIUS GREENFIELD
Assistant Attorney General
of Counsel

Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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Opinions Below

The opinion of the New York Court of Appeals (App. 38-39) is reported at 24 N. Y. 2d 30, 246 N. E. 2d 517 (1969). The unanimous affirmance without opinion, by the Supreme Court, Appellate Division, First Department,

is reported at 30 A. D. 2d 778, 292 N.Y.S. 2d 353 (1968). The memorandum opinion of the Supreme Court, New York County is not officially reported. It is set forth at page 1 of the appellant's brief.

Jurisdiction

The order of the New York Court of Appeals was entered on February 20, 1969. The notice of appeal was filed on April 4, 1969 and probable jurisdiction was noted on June 16, 1969. The jurisdiction of this Court rests on 28 U.S.C. 1257 (2).

Constitutional and Statutory Provisions Involved

The First Amendment to the Constitution of the United States provides in part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

The New York State Constitution, Article 16, § 1, provides in relevant part:

> "Exemption from taxation may be granted only by general laws: Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any, corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit."

The New York Real Property Tax Law § 420(1) provides in part:

> "Real property owned by a corporation or association organized exclusively for the moral or mental

improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playgrounds, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes * * * and used exclusively for carrying out thereupon one or more of such purposes * * * shall be exempt from taxation as provided in this section."

Question Presented

Assuming that this Court is satisfied that there is jurisdiction under *Doremus* v. *Board of Education*, 342 U. S. 429 (1952), the question is whether the exemption from taxation which includes the real property of religious organizations, used exclusively for their religious purposes, violates the First and Fourteenth Amendments to the United States Constitution.

Interest of the State of New York

The New York Constitution, Article XVI § 1 and the New York Real Property Tax Law § 420(1) insofar as they include the exemption of religious organizations are the subject of the appellant's attack. This brief is being filed pursuant to the provisions of Rule 42(4) of the Rules of this Court. The Attorney General has the statutory function of defending the constitutionality of such provisions. New York Executive Law, Section 71.

Statement of the Case

Appellant is the owner of certain real property located in the County of Richmond, State of New York. His action against the Tax Commission of the City of New York is predicated upon the contention that tax exemptions for the tax year beginning July 1, 1967 which are granted

to religious corporations for real property used by them for religious purposes (together with other non-profit organizations), violate his religious freedom and confiscate his property without due process of law (App. 6). The motion for summary judgment of the Tax Commission was granted by a Special Term of the New York Supreme Court, which said, "Such exemptions are granted in pursuance of long-standing public policy of this State under a statute which is presumptively constitutional and which is hereby sustained". The Appellate Division unanimously affirmed without opinion (App. 30). The Court of Appeals also unanimously affirmed, in a per curiam opinion in which all but one judge concurred, saying that, "* * * courts throughout the country have long and consistently held that the exemption of such real property from taxation does not violate the Constitution of the United States * * *" (App. 38-39). This appeal followed. Thereupon the appellee, Tax Commission, moved to dismiss the appeal. This Court noted probable jurisdiction on June 16, 1969.

Summary of Argument

The compelling public purpose served by religious organizations is constitutionally sufficient to warrant tax exemption of property devoted exclusively to religious purposes. This has been the traditional view both before and after the adoption of the federal and state constitutions. All of the states and the District of Columbia have various forms of tax exemptions for these purposes. These exemptions have co-existed harmoniously with the provisions of state constitutions and state law which mirror the first Amendment restrictions of the United States Constitution. The rigid rhetoric of "a wall between church and state" has been recognized to be a starting point only for determining, in a particular case, whether the rationale and purpose of the First Amendment are offended by state

or federal action. Legislatures may select the subjects of taxation in their discretion. Uniformity of taxation does not require that everything which might be made taxable should be taxed. Tax exemption does not offend the doctrine of strict neutrality. There is no constitutional requirement that government be hostile to religion.

ARGUMENT

The state may properly exempt from taxation the property of religious organizations. Such exemptions do not violate the United States Constitution.

Based upon the importance of religion to the public welfare, it has been accepted as axiomatic from colonial days that the property of religious organizations is devoted to a public use which ought not to be the subject of taxation. *People ex rel. Watchtower Soc.* v. *Haring,* 8 N. Y. 2d 350, 357 (1960), 170 N. E. 2d 677. Tax exemptions of this nature exist in every state of the union and the District of Columbia[1] and they have co-existed harmoniously with statutory and constitutional provisions of the various states directed toward the same purposes as the First Amendment to the United States Constitution.

The moral, ethical, cultural and social contributions of religion are too well known to require extended comment. *Bradfield* v. *Roberts,* 175 U. S. 291 (1899). In addition, similar activities which might also be classified as the secular branch of religious activities, particularly those which fall within the traditional role of religion in the broad spectrum of charitable activities, are of inestimable benefit to the community. In the Ordinance of 1787: The Northwest Territorial Government, enacted by the Con-

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[1] See appendix listing the Constitutional and statutory tax exemption provisions of the various states and the District of Columbia.

federate Congress on July 13, 1787, it was stated, in Article III:

> "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

In New York the state legislature, in the same session in which it repealed colonial acts establishing the Episcopal Church in certain counties of New York (Chapter 38 of the Laws of 1784), also passed an act which permitted the incorporation of all religious denominations. The preamble to that act (Chapter 18 of the Laws of 1784) stated in part:

> "And whereas it is the duty of all wise, free and virtuous governments, to countenance and encourage virtue and religion, and remove every lett or impediment to the growth and prosperity of the people, and to enable every religious denomination to provide for the decent and honorable support of divine worship agreeable to the dictates of conscience and judgment."

The public policy of New York of exempting religious and charitable real property from taxation was evinced early in the history of the state. The Laws of 1799, Chapter 72 provided for the assessment and collection of taxes upon real and personal property. It was also provided:

> "And be it further enacted, that no house or land belonging to the United States, or to the people of the State, nor any church or place of public worship, or any personal property belonging to any ordained minister of the Gospel, nor any college or incorporated academy, nor any schoolhouse, court house, gaol, alms house or property belonging to any incorporated library, shall be taxed by virtue of this act."

Similar exemption provisions were enacted by the New York Legislature by the Laws of 1801, Chapter 179; Laws of 1813, Chapter LII; Laws of 1823, Chapter CCLXII; which were collated in the Revised Statutes of 1829, Chapter XIII, Title I, Section 4 and by the Laws of 1883, Chapter 397.

In 1893, the statutory exemption provisions began to take a form substantially similar to the present provisions of Real Property Tax Law § 420(1). The Laws of 1893, Chapter 498 provided:

> "The real property of a corporation or association organized exclusively for the moral and mental improvement of men or women or for religious, charitable, missionary, hospital, educational, patriotic, historical or cemetery purposes, or for two or more of such purposes, and used exclusively for carrying out thereupon one or more of such purposes shall be exempt from taxation of * * *".

By the Laws of 1896, Chapter 908, additions were made to the group of exempt organizations. These additions included bible, tract, benevolent, infirmary, scientific, literary, library and other organizations for the enforcement of laws relating to children or animals. The statute as it presently exists, Real Property Tax Law § 420(1), was enacted in 1958 (Laws of 1958, Chapter 959) and essentially it is a re-enactment of the 1896 statute. The New York State Constitutional provision authorizing exemptions from taxation, Article XVI § 1, was adopted in 1938.

The grouping of church exemptions with public property and charitable property exemptons is significant. It stems from the prevailing belief that encouragement of religion serves the general public welfare. It is noteworthy that the present exemption provisions in Real Property Tax Law § 420(1) are cast in a similar frame of

reference, "religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational * * * purposes."

The social value of religion is at least equal to the social and economic values which form a basis for other permissible exemptions, such as those for charitable or educational purposes. In *Abington School District* v. *Schempp*, 374 U. S. 203 (1963), in the concurring opinion of Mr. Justice Brennan it was said (at pp. 301-302):

> "D. *Uniform Tax Exemptions Incidentally Available to Religious Institutions.* Nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups. There is no indication that taxing authorities have used such benefits in any way to subsidize worship or foster belief in God. And as among religious beneficiaries, the tax exemption or deduction can be truly nondiscriminatory, available on equal terms to small as well as large religious bodies, to popular and unpopular sects, and to those organizations which reject as well as those which accept a belief in God."

And in the concurring opinion of Mr. Justice Goldberg, in which Mr. Justice Harlan joined, it was said (p. 306):

> "It is said and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to

> the secular and a passive or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."

Entirely apart from these considerations there are compelling reasons for the state not to tax the property of religious organizations devoted to religious uses. It has been suggested that since this property does not normally generate income the imposition of taxes could amount to a substantial interference with the free exercise of religion. The same writer points to a fundamental economic difference between appropriating revenues for churches and failing to send tax bills.[2]

> "In the case of direct subsidy, the state forcibly diverts the income of believers and nonbelievers to churches. In the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions."

These impositions, it is said, would divert church revenues from "socially valuable, privately organized educational and charitable activities."

Thomas Jefferson and James Madison were two of the outstanding spokesmen for the anti-establishment position. It was Jefferson who apparently first used the phrase "a wall of separation between church and state." Madison, who was primarily responsible for the First Amendment, stated that his understanding of its meaning was that "Congress should not establish a religion, and enforce the legal observation of it by law nor compel men to worship God in any manner contrary to their con-

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[2] Ginnella: Religious Liberty, Nonestablishment and Doctrinal Development, Part II The Nonestablishment Principle, 81 Harv. L. Rev. 513, 553 (1968).

science.'"[3] Yet it is quite clear that neither Jefferson nor Madison regarded this "wall" as an immutable categorical commandment. For example in the administration of both presidents, federal funds were used to aid religion in various ways, including the support of chaplaincies and missionaries to the indians. Of even greater significance is the fact that an act exempting church property in the District of Columbia from taxation was first enacted in 1802[4] and in 1804, when Congress amended the act incorporating the City of Washington, it permitted this exemption to stand.[5] This, of course, was during Jefferson's tenure as president.

Similar compatible practices have continued to present times as witness the exemption of clergyman, divinity students and conscientious objectors from the draft, the use of the bible for administering oaths, the availability of NYA and WPA funds to public and sectarian schools during the depression, special postal privileges to religious organizations, the eligibility of hospitals owned by religious organizations for aid under the Hill-Burton Hospital Construction Act,[6] the Surplus Property Act of 1944 which, as of 1961, had resulted in 488 grants of land and buildings to church-related schools of thirty-five denominations,[7] the exemption from taxation of religious, charitable, educational and other similar corporations,[8] the income tax charitable deduction for contributions to charities and churches[9] and the estate tax deductions for bequests and

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[3] 1 Annals of Congress 729-731 (Benton Ed. 1858).

[4] Washington City Laws 1802-03, Act of October 6, 1802.

[5] Act of February 24, 1804, Ch. 14, 2 Stat. 254.

[6] Hill-Burton Act of 1946, 60 Stat. 1040, 42 U.S.C. §§ 29-92.

[7] 58 Stat. 765 (1944), 40 U.S.C. §§ 484(j) and 484(k); 107 Cong. Rec. 18501.

[8] 26 U.S.C. § 501(a) and (c).

[9] 26 U.S.C. § 170.

devises to religious, educational, charitable and other similar organizations.[10]

Although it is for this Court ultimately to determine whether federal constitutional guarantees are offended, it should not be "indifferent to the unanimous opinion of generations of judges" nor ignore that consensus of views. *McGowan* v. *Maryland*, 366 U. S. 420, 510 (1961). Referring to the time honored practice of the legislatures in continuing exemptions of church property, it was said in *Snyder* v. *Town of Newtown*, 147 Conn. 374, 161 A. 2d 770, 776 (1960), app. dismissed 365 U. S. 299 (1961):

> "A practical construction placed upon a constitutional provision immediately after its adoption and consistently and repeatedly followed by the legislature for over a century is most persuasive."

The appellant has been unable to point to a single state or federal case in which religious tax exemptions have been held invalid. This stems from the fact that in an uninterrupted series of determinations of long standing these tax exemptions have been held constitutionally inoffensive.[11]

Moreover, as was said by Mr. Justice Holmes in *Interstate Consolidated Street Ry. Co.* v. *Commonwealth of Massachusetts*, 207 U. S. 79, 88 (1907):

> "It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly

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[10] 26 U.S.C. § 2055.

[11] *Trinity Church* v. *City of Boston*, 118 Mass. 164 (1875); *Trustees of Griswold College* v. *State*, 46 Iowa 275 (1877); *Trustees of the First Methodist Episcopal Church South* v. *The City of Atlanta*, 76 Ga. 181 (1886); *Lundberg* v. *County of Alameda*, 46 Cal. 2d 644 (1956) app. dismissed sub nom *Heisey* v. *County of Alameda*, 352 U. S. 921 (1956); *Snyder* v. *Town of Newtown*, 147 Conn. 374 (1960) app. dismissed 365 U. S. 299 (1961); *General Finance Corp.* v *Archetto*, 93 R. I. 392 (1961), app. dismissed 369 U. S. 423 (1961); *State ex rel. Reynolds* v. *Nusbaum*, 17 Wis. 2d 148 (1962); *Murray* v. *Comptroller of the Treasury*, 241 Md. 383 (1966) cert. den. 385 U. S. 816 (1966).

that it goes beyond that power. In case of real doubt a law must be sustained."

The principles enunciated in *Everson* v. *Board of Education*, 330 U. S. 1 (1947) have been the subject of much critical appraisal. The essence of that opinion is contained in the statement at pages 15 and 16. It is there said:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State'."

Appellant's simplistic reliance upon a re-statement of these principles does not approach the problem before this Court. As was said by Mr. Justice Frankfurter in *McCollum* v. *Board of Education*, 333 U. S. 203, 212-213 (1948):

> "This case, in the light of the *Everson* decision, demonstrates anew that the mere formulation of a relevant Constitutional principle is the beginning of the solu-

> tion of a problem, not its answer. This is so because the meaning of a spacious conception like that of the separation of Church and State is unfolded as appeal is made to the principle from case to case. We are all agreed that the First and the Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.' But agreement, in the abstract, that the First Amendment was designed to erect a 'wall of separation between church and State', does not preclude a clash of views as to what the wall separates. Involved is not only the Constitutional principle but the implications of judicial review in its enforcement. Accommodation of legislative freedom and Constitutional limitations upon that freedom cannot be achieved by a mere phrase."

In the cases that have followed this Court has formulated other criteria. In *Zorach* v. *Clauson*, 343 U. S. 306, 314 (1952), it found that there was "no constitutional requirement for government to be hostile to religion and to throw its weight against efforts to widen the scope of religious influence". In *McGowan* v. *Maryland, supra*, 366 U. S. at 443-444, it observed that the public financing of transportation in *Everson* had been upheld because the purpose and effect of the statute was the general welfare and in *Abington School Dist.* v. *Schempp, supra*, 374 U. S. at 222, this Court enunciated the purpose and primary effect test, saying:

> "That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion * * *."

Most recently, in upholding the New York law authorizing the free lending of text books to children in private schools, *Board of Education* v. *Allen*, 392 U. S. 236 (1968),

this Court relied upon that test and held that the law provided a valid secular purpose program. This holding has given rise to the observation that the states are not precluded from pursuing such programs even though they give incidental aid to religion.[12]

Whether or not this is a permissible interpretation of the *Allen* holding, the rationale of that determination would appear to have even more compelling application in the case of religious tax exemptions. The New York Court of Appeals has held that loss of potential tax revenues resulting from these exemptions does not warrant their denial. In *Matter of Diocese of Rochester* v. *Planning Board*, 1 N. Y. 2d 508 (1956), the Court held (p. 526) that, "• • • church and school and accessory uses are, in themselves, clearly in furtherance of public morals and general welfare". Speaking of these exemptions, the Court said (p. 524):

> "Section 1 of Article XVI of the Constitution of this State provides that 'real or personal property used exclusively for religious, educational or charitable purposes' shall always be exempt from taxation, and such institutions have been granted tax exemption (Tax Law § 4, subd. 6). Thus the paramount authority of this State has declared a policy that churches and schools are more important than local taxes, and that it is in furtherance of the general welfare to exclude such institutions from taxation."

In *Washington Ethical Society* v. *District of Columbia*, 249 F. 2d 127 (D. C. Cir. 1957), the application of the District of Columbia Code § 47-801a was in issue. That statute exempts from taxation, "churches, including buildings and structures reasonably necessary and usual in the perform-

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[12] Kauper, The Warren Court: Religion Liberty and Church-State Relations, 67 Mich. L. Rev. 269, 285 (1968).

ance of the activities of the church". In the course of upholding the exempt status of the petitioner, the Court said, in an opinion by then Circuit Judge Burger (p. 129):

> "Congress in granting tax exemptions under this statute, like most of the states, was giving expression to a broad legislative purpose to grant support to elements in the community regarded as good for the community. In the exercise of its undoubted power Congress has extended tax immunity not only to sincere and bona fide religious activities but also to various educational and patriotic societies and groups whose programs are thought to be in the public interest and welfare. The exemption of buildings belonging to 'religious corporations or societies' is in a context of exemption to art galleries, libraries, public charities, hospitals, schools and colleges and many named organizations."

The parallel logic of these views is demonstrated by the three state court cases explicitly upholding religious tax exemptions in the face of attack based on First Amendment considerations. This Court denied review in all three cases. In the first case, *Lundberg* v. *County of Alameda,* 46 Cal. 2d 644, 298 P. 2d 1 (1956), app, dismissed *sub nom Heisey* v. *County of Alameda,* 352 U. S. 921 (1956), it was held (298 P. 2d at p. 7), that the exemption was enacted to promote the general welfare and that, even if it benefited religious organizations, it did not violate the First Amendment. The California Court adverted to the time honored practice of granting exemptions of church property and the existence of these exemptions in all states and the District of Columbia. It then concluded that the principle of separation of church and state was not impaired by granting tax exemptions to religious groups.

General Finance Corporation v. *Archetto,* 93 R. I. 392, 176 A. 2d 73 (1961), app. dismissed 369 U. S. 433 (1962),

involved a similar First Amendment attack on tax exemptions and a similar rejection. The Rhode Island Court pointed out that (176 A. 2d at p. 78):

> "In granting tax exemptions to religious organizations, however, it seems to us that the incidental benefit is not such as to constitute direct participation by state authorities in the promotion of religious education, as the court indicated was the case on the facts peculiar to the McCollum decision."

More recently, in *Murray* v. *Comptroller of the Treasury*, 241 Md. 383, 216 A. 2d 897, cert. denied 385 U. S. 816 (1966), it was noted that tax exemptions to religious organizations had long been regarded as reasonable and for a public purpose. The grant of exemptions to church property, the Court said, does not support religious bodies in the sense that the state espouses their acceptance (216 A. 2d at p. 906). The prevailing and unanimous belief among the states that tax exemptions do not violate constitutional prohibitions is evident from the existence of such exemptions in every state and the District of Columbia. Furthermore, a major part of the activities of religious organizations consists of activities of a secular nature which serve public needs and save public expense. To deny those exemptions in the face of similar exemptions for charitable institutions would raise serious questions of unconstitutional discrimination (p. 907). The Court then concluded that the exemption of religious real property did not violate the "establishment" clause and was constitutional.

The determinations in these cases are consistent also, with the view expressed by Mr. Justice Reed in his dissenting opinion in *McCollum* v. *Board of Education*, 333 U. S. 203, 249 (1948):

> "It seems clear to me that the 'aid' referred to by the Court in the Everson case could not have been those

incidental advantages that religious bodies, with other groups similarly situated, obtain as a by product of organized society. This explains the well-known fact that all churches receive 'aid' from government in the form of freedom from taxation."

Moreover, basic to all tax exemptions is the repeatedly accepted constitutional principle that the state is free to select the subjects of taxation, may decline to tax other kinds of property and neither due process nor equal protection imposes any rigid rule of equality of taxation.[13] It was held in *Bell's Gap RR Co.* v. *Pennsylvania,* 134 U. S. 232, 237 (1890) that:

"The provision in the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions."

The policy and principle supporting tax exemptions are stated in Cooley's Constitutional Limitations, Eighth Edition Vol. 2, at pages 1086-89 as follows:

"The legislature must also, except when an unbending rule has been prescribed for it by the constitution, have power to select in its discretion the subjects of taxation. The rule of uniformity requires an apportionment among all the subjects of taxation within the districts; but it does not require that everything which the legislature might make taxable shall be made so in fact. Many exemptions are usually made from taxation from reasons the cogency of which is at once

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[13] *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495 (1936); *Williams* v. *Baltimore,* 289 U. S. 36 (1933).

> apparent. * * * The property of educational and religious institutions is also generally exempted from taxation by law upon very similar considerations, and from a prevailing belief that it is the policy and interest of the State to encourage them."

It is not necessary, in order to sustain tax exemptions to religious organizations, to fall back upon the worn cliche that, "the power to tax is the power to destroy". Nor, equally, is it necessary to invoke the free exercise clause as the basis for the argument that the imposition of taxes would violate that right. *Cf. Follett* v. *McCormick*, 321 U. S. 573 (1944). It is sufficient if the injunction of *Everson* (*supra*, 330 U. S. at 18) is observed:

> "That [First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

While the First Amendment precludes aid to religion as such, aid extended to religious activities incidental to a broader classification which rests on legitimate secular and public welfare basis is constitutionally permissible. *Abington School District* v. *Schempp, supra,* 374 U. S. pp. 214-215, 222. This exemption concept, of such standing as to bear the imprint of long generations of approval, differs completely from the tax system used to support an established church. Indeed, as is suggested by Kauper:[14]

> "In many states they have also been recently amended to extend the scope of the exemption. This suggests a rationally conceived and deep-seated policy, and not

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[14] Kauper, The Constitutionality of Tax Exemptions for Religious Activities in, "The Wall Between Church and State" 95, 110 (Oaks ed. 1963).

an accidental or vestigial survival of outmoded practices."

The selection of religious organizations for tax exemption, as in the case of charitable, educational and other similar organizations, reflects the policy of the law to encourage and foster these institutions for the reason that they are beneficial to the public and necessary to the advancement of civilized society. The legislative judgment which permits this accommodation to religion represents a weighing of a wide variety of views and should be respected in the absence of a clear showing of violation of the duty of neutrality. True neutrality, it is submitted, is observed in the policy that declares that the property of religious institutions used for religious purposes, should not be the subject of taxation.

The practical consequences of invalidating these exemptions is obvious. Of greater consequence however, would be to overturn a practice sanctioned by time, custom, general prevalence and to this point, universal judicial approval. This Court has said that the doctrine of reasonable doubt will be construed most strongly in favor of state tax legislation. *Madden* v. *Commonwealth of Kentucky*, 309 U. S. 83 (1940). That principle is fully applicable here.

CONCLUSION

The New York constitutional and statutory provisions should be upheld. Consequently, the judgment appealed from should be affirmed.

Dated: New York, New York, October 8, 1969.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JULIUS GREENFIELD
Assistant Attorney General
of Counsel

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APPENDIX

Religious Exemptions Granted By

	Constitutional Provision		
	Mandating Exemption	*Authorizing Legislation*	*Statutory Provision*
Alabama		Art. IV, § 91	Title 51, § 2
Alaska	Art. IX, § 4		
Arizona		Art. IX, § 2	Title 42, § 42-271(6)
Arkansas	Art. XVI, § 5		Title 84, § 84-206(1st)
California		Art. XIII, § 1c	§ 206, § 214, § 214.5, Rev. & Tax C.A.
Colorado	Art. X, § 5		§ 137-2-2
Connecticut			Title 12, 12-81(13)
Delaware		Art. VIII, § 1	Title 9, § 8103
District of Columbia			§ 47-801a
Florida	Art. XVI, § 16		Title 13, § 192.62
Georgia		Art. VII, § 1, ¶ 4	§ 2-5404 Title 92, § 92-201
Hawaii			§ 128-18(3)
Idaho			Title 63-105B
Illinois		Art. IX, § 3	Title 120 § 500.2
Indiana		Art. X, § 1	Title 64, § 64-201, ¶¶ 5th & 6th

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	Constitutional Provision		
	Mandating Exemption	*Authorizing Legislation*	*Statutory Provision*
Iowa	Art. II, § 1		§ 427.1(9)
Kansas	Art. XI		§ 79-201
Kentucky	§ 170 (acreage limit)		
Louisiana	Art. X, § 4(2)		
Maine			Title 36, § 652 (1) (G)
Maryland			Art. 81, § 9(4)
Massachusetts			Ch. 59, § 5
Michigan	Art. IX, § 4		§ 211.7
Minnesota	Art. IX, § 1		§274.02
Mississippi			Title 39, § 9697(d)
Missouri		Art. X, § 6	Title 10, § 137.100(5)
Montana		Art. XII, § 2	Title 84, § 84-202
Nebraska		Art. VIII § 2	Ch. 77, § 77-202
Nevada			Title 32, 361.125
New Hampshire			Ch. 72, § 72:23(III)
New Jersey	Art. VIII, § 1 and 2		§ 54:4-36
New Mexico	Art. VIII, § 3		
New York	Art. XVI, § 1		§ 420, R.P.T.L.
North Carolina		Art. V, § 5	§ 105-296(3) (4a)

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	Constitutional Provision		
	Mandating Exemption	*Authorizing Legislation*	*Statutory Provision*
orth Dakota	Art. XI, § 176		§ 57-02-08(7)
hio		Art. XII, § 2	§ 5709.07
klahoma	Art. X, § 6		Title 68, § 2405(g)
regon			Ch. 307, § 307.140
ennsylvania		Art. VIII, § 2(a)(i)	72-§ 5020-204
hode Island			Title 44, §44-3-3
. Carolina	Art. X, § 4		§ 65-1522(14)
. Dakota		Art. XI, § 6	§ 57.0311
ennessee		Art. II, § 28	67-502(2)
exas		Art. VIII, § 2	Title 122, Art. 7150(1)
tah	Art. XIII, § 2		Title 59, § 59-2-1
ermont			Title 32, § 3802(4)
irginia	Art. XIII, § 183		Title 58, § 58-12
ashington		Art. VII, § 2	Title 84, § 84.36.020
est Va.		Art. X, § 1	§ 11-3-9
isconsin		Art. VIII, § 1	§ 70.11
yoming		Art. XV, § 12	Title 39, § 39-7(5)(G)

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The following Attorneys General joined in the submission of the foregoing brief:

ALABAMA

HON. MAC DONALD GALLION
Attorney General
Montgomery, Alabama 36104

ARIZONA

HON. GARY K. NELSON
Attorney General
Phoenix, Arizona 85007

ARKANSAS

HON. JOE PURCELL
Attorney General
Little Rock, Arkansas 72201

COLORADO

HON. DUKE W. DUNBAR
Attorney General
Denver, Colorado 80203

CONNECTICUT

HON. ROBERT K. KILLIAN
Attorney General
Hartford, Connecticut 06115

DELAWARE

HON. DAVID P. BUCKSON
Attorney General
Dover, Delaware 19901

FLORIDA

HON. EARL FAIRCLOTH
Attorney General
Tallahassee, Florida 32304

HAWAII

HON. BERTRAM T. KANBARA
Attorney General
Honolulu, Hawaii 96813

ILLINOIS

HON. WILLIAM J. SCOTT
Attorney General
Springfield, Illinois 83702

INDIANA

HON. THEODORE L. SENDAK
Attorney General
Indianapolis, Indiana 46204

IOWA

HON. RICHARD C. TURNER
Attorney General
Des Moines, Iowa 50319

KANSAS

HON. KENT FRIZZELL
Attorney General
Topeka, Kansas 66612

KENTUCKY

HON. JOHN B. BRECKINRIDGE
Attorney General
Frankfort, Kentucky 40601

LOUISIANA

HON. JACK P. F. GREMILLION
Attorney General
Baton Rouge, Louisiana 70804

MAINE

HON. JAMES S. ERWIN
Attorney General
Augusta, Maine 04330

MARYLAND

HON. FRANCIS B. BURCH
Attorney General
Baltimore, Maryland 21201

MICHIGAN

HON. FRANK J. KELLEY
Attorney General
Lansing, Michigan 48902

MISSISSIPPI

HON. A. F. SUMMER
Attorney General
Jackson, Mississippi 39201

MISSOURI

HON. JOHN C. DANFORTH
Attorney General
Jefferson City, Missouri 65101

MONTANA

HON. ROBERT L. WOODAHL
Attorney General
Helena, Montana 59601

NEBRASKA

HON. CLARENCE A. H. MEYER
Attorney General
Lincoln, Nebraska 68509

NEW JERSEY

HON. ARTHUR J. SILLS
Attorney General
Trenton, New Jersey 08625

NEW MEXICO

HON. JAMES A. MALONEY
Attorney General
Santa Fe, New Mexico 87501

NORTH CAROLINA

HON. ROBERT B. MORGAN
Attorney General
Raleigh, North Carolina 27602

NORTH DAKOTA

HON. HELGI JOHANNESON
Attorney General
Bismarck, North Dakota 58501

OHIO

HON. PAUL W. BROWN
Attorney General
Columbus, Ohio 43215

PENNSYLVANIA

HON. WILLIAM C. SENNETT
Attorney General
Harrisburg, Pennsylvania 17120

PUERTO RICO

HON. SANTIAGO C. SOLER-FAVALE
Attorney General
San Juan, Puerto Rico 00902

RHODE ISLAND

HON. HERBERT F. DE SIMONE
Attorney General
Providence, Rhode Island 02903

SOUTH DAKOTA

HON. GORDON MYDLAND
Attorney General
Pierre, South Dakota 57501

TENNESSEE

HON. GEORGE F. MCCANLESS
Attorney General
Nashville, Tennessee 37219

TEXAS

HON. CRAWFORD C. MARTIN
Attorney General
Austin, Texas 78711

VERMONT

HON. JAMES M. JEFFORDS
Attorney General
Montpelier, Vermont 05602

VIRGINIA

HON. ROBERT Y. BUTTON
Attorney General
Richmond, Virginia 23219

WASHINGTON

HON. SLADE GORTON
Attorney General
Olympia, Washington 98501

WISCONSIN

HON. ROBERT W. WARREN
Attorney General
Madison, Wisconsin 53702

WYOMING

HON. JAMES E. BARRETT
Attorney General
Cheyenne, Wyoming 82001

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 135

FREDERICK WALZ, *Appellant*,

v.

TAX COMMISSION OF THE CITY OF NEW YORK, *Appellee*.

Appeal from the Court of Appeals
of the State of New York

BRIEF OF UNITED STATES CATHOLIC CONFERENCE, AMICUS CURIAE

INTRODUCTORY STATEMENT

The facts of record in this case, the pertinent New York constitutional and statutory provisions, the provisions of the United States Constitution involved, and the opinions of the courts below are set out in the briefs filed by the appellant and the appellee. This *amicus* accepts them for purposes of its own brief. Both parties

have consented in writing to the filing of this brief *amicus curiae* by the United States Catholic Conference.*

THE INTEREST OF THIS AMICUS

USCC is an agency of the Catholic Bishops of the United States. Its predecessor, established in 1919, was known as the National Catholic Welfare Conference. The prime purpose of USCC is to unify and coordinate activities of the Catholic people of the United States in programs and works of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, communications and public affairs, with emphasis on the preservation of religious liberty in America.

Among its responsibilities, USCC is authorized to represent the Catholic people of the United States, speaking through their Bishops on matters of public concern. When deemed appropriate, USCC is authorized to offer its views, if permitted by court rule or practice, in Federal and State court litigation touching important interests of the Catholic people in the United States, especially in cases involving constitutional issues turning upon the proper construction of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, as that provision protects the freedoms guaranteed by the religion clauses of the First Amendment.

It is the concern of USCC that exemptions voluntarily granted by the tax laws of all the States for religious property used exclusively for religious activities not be

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*Hereinafter usually referred to as "USCC".

constitutionally forbidden by this Court. This *amicus* considers such tax exemptions of church properties, which have been extended by all the States to religious organizations (in the broadest sense of the term "religious"), to be one of the main bases of the American constitutional tradition under which State and Church remain respectful of one another but forever separate from each other. The deliberate, unbroken and universal practice of willingly affording tax exemptions for the property of religious organizations devoted to religious uses has a special efficacy and constitutional importance when the exemptions are those afforded to houses or places of religious worship. For this Court to require extension of the auditing eye and collecting hand of the State's tax authorities in this area would be an unnecessary mandate and, perhaps, an invidious disregard of the uniquely successful American experience in providing and protecting religious liberty for all citizens.

USCC also is of the opinion that other adverse consequences might occur, should the tax exemptions of the type involved in the instant case be forbidden. If such exemptions are abolished, it will be impossible for the churches to continue to carry on, at anything like their present level, those important public welfare activities of benefit to people, as well as to society and the State which for so long have been recognized as among the prime obligations of any church or organization worthy of the name "religious".

Some indication of the relative magnitude and importance of the public welfare activities conducted by the Catholic Church in the United States may be gained from the following statistics: At the present time agencies

connected with the Catholic Church are operating 834 hospitals in the United States which contain 156,838 beds (approximately 30% of the bed capacity for general hospitals in the Country). In 1967, these hospitals had 5,446,675 admissions. The school system is of comparable size. In 1967 there were 10,603 parochial schools enrolling 4,143,150 students and 2,356 secondary schools enrolling 1,098,756 students. Additionally, there are 308 colleges sponsored or maintained by corporations and religious orders affiliated with the Catholic Church. These have an enrollment of 433,960 students. In 1968 there were 103 protective institutions with 8,110 students; 142 special hospitals and sanitoria with a bed capacity of 11,578; and 239 child care institutions with 21,237 resident children. In that year, there were 25,188 foster homes operated in connection with Catholic charities. Agencies of the Catholic Church maintain 420 homes for the aged with 37,966 residents. Agencies of the Catholic Church in America also sponsor a number of public housing projects to which they make substantial donations.

The public welfare activities of the Catholic Church in America and its related or affiliated corporations and agencies are seeking to lend aid to Americans distressed in many different ways, related to health, welfare, poverty, education, urban housing and civil rights. Substantial amounts of money, as well as the contributed services of many thousands of religious personnel and a host of lay volunteers, will be required in order to respond adequately to the increasing tempo of these social challenges, not only in the depressed, center city sections of the major metropolitan areas of the Nation, but also in the rural and economically underdeveloped

areas of America where poverty flourishes with equal intensity.

The public welfare responsibilities conducted by the Catholic Church in the United States are matched in magnitude and scope by those carried on by the other churches. They, too, face the same challenges to the effective fulfillment of those responsibilities in today's troubled society. Any diminution, by the elimination of tax exemptions, of the capacity of all religions to respond to these challenges would be prejudicial not only to religious liberty but also to the secular general welfare.

Finally, it is USCC's specific concern in this litigation that State tax exemptions provided places of religious worship, which from the beginning of the Nation have formed a significant part of the successful American experience in religious freedom, not be unalterably prohibited by a strained and non-historical reading of the Fourteenth Amendment and of the Non-Establishment Clause of the First Amendment. The house of worship is the prime example of religious property devoted to a religious use. Its exemptibility, therefore, is the very heart and center of this case. The Court is not dealing with mere pieces of real estate or everyday buildings of commerce or industry. The Court is dealing with the pulpit, the sanctuary and the altar.

For the reasons stated below, the *amicus* supports the appellee in urging that the Court either dismiss the appeal or affirm the decision of the Court of Appeals of New York.

QUESTIONS PRESENTED

The appellant challenges provisions of the New York Constitution and a provision of the New York Real Property Tax Law on the grounds that the tax exemptions they afford real estate owned by nonprofit religious organizations and used exclusively for religious purposes violate the religion clauses of the First Amendment, as these are incorporated in the Fourteenth Amendment. However, the *amicus* believes that there is another issue, jurisdictional in nature, which the Court should examine. This second issue, because of its nature, perhaps, was not considered by the courts below, but merits consideration in this Court.

The questions the *amicus* believes to be presented on the present record are:

1. Has the appellant properly presented a federal question on the basis of the record made in the courts below?

2. Does the tax exemption granted by Article XVI, Section 1 of the New York Constitution and Section 420, Subd. 1 of the New York Real Property Tax Law with respect to real property owned by religious organizations and used exclusively for religious purposes violate the religious guarantees of the Due Process Clause of the Fourteenth Amendment, in so far as it incorporates the Non-Establishment and Free Exercise Clauses of the First Amendment?

SUMMARY OF ARGUMENT

I.

The barren record out of which this appeal emerges raises the question as to whether the case is a proper vehicle for the disposition of the important issues which the appellant attempts to raise. The many substantial omissions of relevant fact, relating not only to the appellant's interest but also to the amount, nature, scope and effect of the exemptions which he challenges, argue that the instant litigation is "too fragile a foundation for indulging in constitutional adjudication." *Poe v. Ullman*, 367 U.S. 497, 501 (1961). Unless the Court is disposed to affirm the decision of the Court of Appeals of New York, the *amicus* urges that it vacate its order noting probable jurisdiction of this case and dismiss the appeal for want of a properly presented federal question.

II.

The issue in this case is not whether the tax exemption under attack is desirable from the standpoint of legislative policy or from the perspective of one, many or all religions. The sole question for decision is whether, if a governmental body makes a considered policy judgment to exempt from taxation the property of nonprofit religious organizations used exclusively for religious purposes, as part of a general scheme of taxation in which similar exemptions are afforded the property of a great many nonprofit secular organizations, the governmental body is constitutionally forbidden to do so by the First or Fourteenth Amendments.

III.

A. In *McGowan v. Maryland*, 366 U.S. 420 (1961), this Court found "the place of Sunday Closing Laws in the First Amendment's history both enlightening and persuasive." The evidence of "the place" of tax exemptions for religious property "in the First Amendment's history" is even more "enlightening and persuasive" in demonstrating that there is nothing constitutionally incompatible between such exemptions and the requirements of the First or Fourteenth Amendments. Tax exemptions for church property have been "practiced by common consent for two hundred years." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). That unbroken constitutional tradition should not now be immutably prohibited by this Court.

B. The Constitution itself makes no reference to tax exemptions. Nor was there any discussion of the practice in the Constitutional Convention, in the petitions requesting enactment of the Bill of Rights, or in the debates on the Bill of Rights. However, following the adoption of the new Constitution and ratification in 1791 of the Bill of Rights, most of the original 13 States soon passed statutes or adopted constitutional provisions specifically exempting religious property from taxation. The Virginia experience is especially pertinent and demonstrates that the birthplace of modern religious liberty in America saw nothing incompatible between complete disestablishment and tax exemptions for religious property. Similarly, during the Presidency of Thomas Jefferson, Washington, D. C., the seat of the new government, adopted a taxing ordinance which exempted houses for public worship.

C. By the time of the Civil War, the great majority of the States had embodied into law, either through constitutional provisions or by statute, or both, the universal custom of granting tax exemptions for religious property. After the Civil War ended, Congress required the former States of the Confederacy, as a condition precedent for readmission to the Union, to rewrite their constitutions for Congressional approval. Significantly, in the constitutions of five of those States adopted for readmission to the Union there was specific provision, either mandatory or permissive in nature, for exemption of church properties.

In 1875, President Grant proposed a constitutional amendment, one provision of which would have ended tax exemptions for church property. Representative, later Senator, Blaine of Maine submitted a proposed constitutional amendment incorporating most of President Grant's suggestions but which did not include, however, the latter's proposal that tax exemptions for churches be eliminated. The proposed amendment never cleared the Congress. The constitutions of 10 States admitted to the Union after the adoption of the Fourteenth Amendment contained provisions limiting the use of public funds in aiding religion, but at the same time provided for some variety of tax exemption for church properties used for religious purposes. It is clear, therefore, that Congress never seriously entertained the notion that State exemption of church property from property taxes offended fundamental provisions of the Bill of Rights.

D. The catalyst which the Blaine amendment provided the States in adopting constitutional provisions which

limited the expenditure of public funds to assist religion did not induce them to eliminate the constitutional or statutory authority which sanctioned tax exemptions for ecclesiastical property. At the present time, the constitutions of thirty-six of the States contain either a mandatory or permissive provision for the exemption of property used for religious purposes. In the remainder of the States a similar exemption is provided by statute.

The Congress has also indicated its consistent endorsement of the practice of tax exemptions for religious property. Exemptions for religious institutions were provided for in the federal income tax of 1894 and have been carried over into the present Internal Revenue Code.

E. From the time the Nation began, every State and Federal legislative body that has taken the question up has come down on the side of permitting tax exemption for church properties used for religious purposes. Yet the religious tax exemptions sanctioned "during our history . . . [have] not in fact begun a series of steps toward the establishment of religion." Paulsen, *Preferment of Religious Institutions In Tax and Labor Legislation*, 14 Law & Contemp. Prob. 120, 147 (1949). Truly, in this particular area of Church-State relationships, "a page of history [has been proved to be] worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

IV.

A. The constitutionality of permitting tax exemption for religious property has been held as constitutional by every court, State or Federal, including this Court, that has ever passed upon the issue. It is clear in this case that the accumulated force of unanimous judicial

opinion, consistently adhered to and voiced many times from colonial days to the present, constitutes a formidable basis from which to argue for the continued constitutional permissibility of tax exemptions for church properties used for worship.

B. No case has been found holding that the granting of such exemptions is contrary to State or Federal constitutional provisions regarding the support or establishment of religion, and, when the matter has been raised, the exemptions have been upheld in each instance. This was true before this Court spoke in *Everson v. Board of Education*, 330 U.S. 1 (1947); it has remained true following that important decision. While the precise rationales upon which the courts have unanimously arrived at the same conclusion concerning the constitutionality of tax exemptions for church property have varied in particular cases, the point is that every State and Federal court that has dealt with the issue from 1791 to the present has upheld the constitutionality of religious tax exemptions.

C. Prior to its decision in *Everson v. Board of Education*, this Court had only one opportunity to pass upon the religious tax exemption within the context of the First Amendment, acknowledging in *dicta* in that case that Congress had the power to exempt church buildings and grounds from real estate taxes. *Gibbons v. District of Columbia*, 116 U.S. 404, 408 (1886). During the pre-*Everson* period the Court several times pointed to the exemption of church property as an illustration of a permissible legislative power to classify for purposes of taxation without violating the Equal Protection Clause of the Fourteenth Amendment. *Bell's Gap Ry. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890).

Following the *Everson* case, this Court has had three prior opportunities to decide the very issue raised on the instant appeal. In two instances the Court upheld the exemption on the merits. *Lundberg v. County of Alameda*, 46 Cal.2d 644, 298 P.2d 1 (1956), *app. dism. sub nom., Heisey v. County of Alameda* 352 U.S. 921 (1956); *General Finance Corp. v. Archetto*, 93 R.I. 392, 176 A.2d 73 (1961), *app. dism.* 369 U.S. 423 (1962). In *Murray v. Comptroller of the Treasury*, 241 Md. 383, 216 A.2d 897 (1966), *cert. den.* 385 U.S. 816 (1966), the Court denied a petition for *certiorari* seeking review of a decision of the Court of Appeals of Maryland upholding tax exemption for structures used exclusively for public worship.

The unanimous action of all courts which have considered the issue in upholding exemptions for church property serves to distinguish the practice from other types of Church-State involvements in which certain governmental policies have been upheld in some cases and struck down in others. Moreover, unlike the background preceding this Court's comparatively recent landmark decisions in the areas of civil rights and reapportionment, there is not only present here a long continued, completely consistent history and unbroken chain of judicial precedents, but there is also absent any compelling demand of the existing social order for the vindication of fundamental constitutional rights, such as existed in those historic cases.

V.

Solidly grounded in legislative history and judicial precedent, religious tax exemptions also draw firm constitutional support from a diversified array of Church-

State decisions by this Court. In interpreting the religious guarantees of the First and Fourteenth Amendments, the Court has demonstrated a perennial concern to restrict the government to secular activities and to protect the religious freedom of individuals and institutions. The New York type of exemption makes an enormous contribution precisely to the secularity of government and to the religious liberty of all citizens and organizations.

Appellant argues that the "no aid" language of the *Everson* case, 330 U.S. 1, 15-16 (1947), invalidates religious property tax exemptions. Appellant's argument, however, takes no cognizance of the rest of the *Everson* opinion, of the decision actually reached in the *Everson* case, or of the other Church-State decisions by this Court. Appellant has attempted what the Court never intended: the substitution of the "no aid" language for the religious guarantees of the First and Fourteenth Amendment.

VI.

Everson was decided in 1947; *School District of Abington Township v. Schempp*, 374 U.S. 203, was decided in 1963. In *Schempp*, the Court repeated the "no aid" language of *Everson* and interpreted it as meaning that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 374 U.S. at 222.

A. Measured by the *Schempp* test, the New York type of exemption at issue in this case fully satisfies the requirements of the Establishment Clause. In applying the test, two types of religious organizations must be

distinguished: those that are exclusively concerned with divine worship, and those that also engage in "service activities," such as caring for the sick and the poor. Exemption of the second class of religious organizations has the same secular purpose and effect as exemption of nonprofit secular organizations that engage in the same activities. If this class of religious organizations were not given the same exemption treatment as its secular counterpart, there would be a serious constitutional issue of discrimination against religion.

With respect to religious organizations of the first class (those engaged exclusively in divine worship), New York intends and achieves at least three secular effects: (1) fostering the objectives of the separation of Church and State; (2) abstention from a chilling fiscal effect on private nonprofit organizations engaged in activities outside the government's authority; and (3) the sound exercise of legislative discretion in choosing economically suitable subjects for taxation.

B. Although the New York exemption fully satisfies the *Schempp* test, there are reasons to doubt that this Court intended *Schempp* to apply in a literal way to the area of the constitutionality of religious exemptions from general secular laws. In granting such exemptions, the State and Federal governments are dealing with religion as such. While the First and Fourteenth Amendments severely limit the competence of government in the field of religion, there are areas, such as the settlement of church property disputes and apportioning the incidence of taxation, where government must act in a way that substantially affects religious interests. In certain areas of unavoidable and substantial contacts

between religion and government, the *Schempp* requirement of a "secular purpose and primary secular effect" does not provide a distinct guideline. Other constitutional criteria of greater applicability can clearly be found in this Court's decisions precisely in the area of religious exemptions from general secular laws.

VII.

To be properly evaluated, religious exemptions must be viewed within the context of the many facets of American Church-State policy. One of the most striking features of that policy is that, with respect to houses of worship, the States have uniformly followed a positive policy on *exemptions* and a negative policy on *grants*. The "symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church." Freund, *Aid to Parochial Schools*, 82 Harv. L. Rev. 1687, n. 16 (1969). In addition to this basic symbolism, the dual policy of the States is based on the fundamentally different political and financial effects of exemptions and grants, and is fully conformed to the dual constitutional guarantees of No Establishment and Free Exercise.

In approaching a modern constitutional analysis of religious tax exemptions of the New York type, the Court will find valuable guidance in its earlier decisions in *Jones v. Opelika*, 316 U.S. 584 (1942), *reversed on rehearing* 319 U.S. 104 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); and *Follett v. Town of McCormick*, 321 U.S. 573 (1944). These three cases fully establish the doctrine that government cannot

impose license taxes on religious activities, because such taxes operate as a prior restraint on First Amendment guarantees and could lead to a crushing financial burden on the free exercise of religion.

Jones, Murdock and *Follett* did not, of course, settle the precise issue before the Court in this case: the permissibility of exempting houses of worship from property taxes. Neither, however, did *Jones, Murdock* and *Follett* raise any question about the propriety of such exemptions.

It is also significant that in a number of other recent decisions, not concerned with taxation, this Court has not hesitated to recognize that the First and Fourteenth Amendments support, and sometimes even require, religious exemptions from general secular laws. In *Board of Education v. Barnette,* 319 U.S. 642 (1943), the Court held that the children of Jehovah's Witnesses had to be exempted from saluting the flag as part of their public school activities. In *Zorach v. Clauson,* 343 U.S. 306 (1952), the Court sustained a statute permitting students to be excused from part of their regular public school attendance in order to attend religious instruction classes. In the *Sunday Closing Law Cases,* 366 U.S. 420, 582, 599, 617 (1961), the Court stated that religious exemptions might be the wiser course, but that they were not mandatory. One year later, in *Arlan's Dept. Store v. Kentucky,* 371 U.S. 218 (1962), the Court dismissed, for want of a substantial federal question, an appeal against a Sunday closing law that specifically exempted from its penal provisions those who worship on a different day than Sunday. In *Sherbert v. Verner,* 374 U.S. 398 (1963), South Carolina was

compelled to exempt a Seventh Day Adventist from one of the provisions of its unemployment compensation laws. Indeed, although *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), held that governmental sponsorship of religious exercises in the public schools was inherently unconstitutional and therefore could not be saved by exemption provisions for dissenters, there is no case in which this Court has ever held a religious exemption from a general secular law unconstitutional.

It is clear from this survey of the Court's recent Church-State decisions that religious exemptions are not inherently suspect. Quite to the contrary, they are an extremely important part of the American heritage of religious liberty.

With particular reference to the New York type of property tax exemption, there are two fundamental constitutional values that justify the permissibility of the legislative policy: maximizing the fiscal separation of Church and State, and minimizing State interference with the free exercise of religion.

If the States were compelled to tax houses of worship, they would have to assess their secular value and enforce collection of the tax. Moreover, the smaller and poorer churches, especially those in rural areas and center-city locations, might well find the burden of taxation extremely onerous.

In the last analysis, appellant's challenge to the New York type of exemption is not based on constitutional arguments, but on the supposed "burden" that the exemption places on him and on the conflict between appellant's conscience and the legislative policy. The Constitution, however, does not require that every piece

of property be taxed, just as it does not guarantee that every taxpayer will be taxed equally. The benefits to society at large from the policy of exempting houses of worship, in common with a wide variety of other private, voluntary, nonprofit organizations, from the property tax more than justify whatever burdens result to the subjects that the legislature has chosen for taxation.

From the very beginning, we have sought to accommodate our laws so that every citizen could live in as much harmony as possible with his conscience and his government. In a Nation as religiously diverse as our own, however, it is not possible to give every citizen's conscience a right of veto over important public policies. Appellant demonstrates no constitutional injury merely by asserting that he is in conscientious disagreement with the government.

History, judicial precedent, and current constitutional analysis combine to support tax exemptions of the New York type as a rationally conceived and deep-seated policy. Appellant has provided no basis for this Court to declare that policy unconstitutional.

VIII.

Constitutional considerations apart, the taxation of houses of worship would produce practical consequences that would have a significantly adverse impact upon the State, the Church and society as a whole.

A. If the States are held to be barred on constitutional grounds from permitting tax exemption for houses of worship, there will be no net financial gain, but perhaps a loss, to the State, and there also will

ensue a substantial curtailment of valuable public benefit services conducted by the agencies of religious organizations, a slack which the State will have to take up itself.

Critics have assigned financial reasons in urging that the practice of voluntary tax exemptions for church properties be discontinued. However, it "is very difficult to make out a convincing factual case for eliminating religious tax exemptions . . . on the basis of the existing data." Paulsen, *supra.* So far as New York City is concerned, the statistics show that the total amount of religious property which is tax exempt in that city represents only 4.9% of the total tax exempt property and that, for example, exemptions for federally aided public housing alone in New York City exceeded the religious property exemption by $13 million.

In addition to financial considerations, significant burdens would be thrown upon the State, if, as a result of the elimination of tax exemptions, the churches and their affiliated institutions were forced to reduce the public benefit activity which they now conduct. *Murray v. Comptroller of the Treasury*, 241 Md. 383, 401, 216 A.2d 897, 907 (1966), *cert. den.* 385 U.S. 816 (1966).

"The exemption of property from taxation is a question of policy and not of power." *State of Ohio v. Knopp*, 57 U.S. 369, 384 (1853). It cannot be fairly maintained, therefore, that the exemptions challenged in this litigation have no reasonable relationship to the achievement and protection of legitimate secular concerns of the State.

B. It is also self evident that, if church properties must be taxed, there will have to be some retrenchment in activities conducted by the churches in order to bear the increased economic burden thus thrust upon them. Undoubtedly, curtailment of social welfare services currently performed by the churches will result. To the extent that a church must reduce the scope and tempo of its good works, it is *pro tanto* less a "religious" organization that it was before.

C. Tax exemptions have played an important part in keeping the complex social structure of our Country in balance. Repudiation by the Court of this longstanding, most deliberate and most cherished tax exemption would inevitably weaken that structure and cannot be justified on the basis of any compelling constitutional reasons advanced in this case.

ARGUMENT

I

The Constitutional Issue Has Not Been Properly Presented

There are compelling reasons supporting the correctness of the decision challenged on this appeal. But whatever may be the Court's views on the merits of the case, there can be no dispute about the magnitude of the constitutional issues which the appellant has attempted to raise. Because of the importance of those issues, the *amicus* respectfully suggests that this Court first consider whether, in the light of the extremely barren record made in the courts below, this case is truly a proper vehicle for their disposition at this time, especially in view of the far-reaching consequences which will follow a decision on the merits.

The Court often has admonished that it will not decide important constitutional questions, however appealing, on the basis of an inadequate or amorphous record.[1] Very recently, four members of this Court declined an opportunity in *Powell v. Texas*[2] to determine that the Cruel and Unusual Punishment Clause of the Eighth Amendment, as now incorporated in the Fourteenth Amendment, barred conviction of a chronic alcoholic for the crime of public drunkenness. As in *Powell, supra,* the record in the present case "is utterly inade-

[1] *Ellis v. Dixon,* 349 U.S. 458, 462 (1955) (record inadequate to support a determination of claims that rights of speech, assembly and equal protection of the laws were denied by state action); *Wolfe v. North Carolina,* 364 U.S. 177, 194 (1960) (claim of racial discrimination on the part of a state agency declined).

[2] 392 U.S. 514, 521 (1968).

quate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide-ranging new constitutional principle."[3]

A reading of the abbreviated appendix filed in this Court reveals the sparseness of the record brought here. It also shows that the plaintiff filed a 2½ page brief in the New York Court of Appeals (A. 38). In this Court, appellant's brief on the merits reaches 8 pages. The section devoted to argument consists primarily of 2½ pages of quotations, without discussion, from the Court's opinion in *Everson v. Board of Education*, 330 U.S. 1 (1947).[4]

More importantly, there is no evidence in this record concerning the amount of church-held real estate ex-

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[3]*Id.* at 521.

[4]Missing from the record are any facts as to: the size and nature of the property owned by the plaintiff; its assessed valuation; the tax paid on it; when he acquired it; and his purpose in acquiring it. The record also is devoid of evidence that appellant's real estate taxes have been, are being, or will be, increased because of the existence of the particular exemptions challenged in his suit. In this connection the New York Times reports that the appellant's property has an assessed valuation of $100, is taxed at $5.24 a year by the City of New York, and was purchased by Mr. Walz for $25 in June 1967, the month he initiated the suit which is now before this Court on appeal. New York Times, June 20, 1969, pp. 1, 35. The record indicates that the deed of purchase was executed on May 20, 1967 (A. 15) and was recorded on June 19, 1967 (A. 16), five days after plaintiff filed his action in the New York Supreme Court (A. 4). The Times report, of course, may or may not be accurate. The point is simply that in these respects, as well as in the others stated above, the record is barren.

empted from taxation in New York City and in New York State by virtue of the constitutional and statutory provisions challenged in this litigation; the value of such church property and its relationship to the total of assessed valuation of real property subject to taxation; the relationship of exempted church property to the total of real property exempted; the financial impact on churches if houses of worship are to be taxed on the same basis as other real estate; and the nature and variety of, and the costs of maintaining, the social welfare, education, charity, hospital and medical assistance, and other related public welfare activities carried on by the church organizations whose real estate is exempted by virtue of the provisions of New York law involved in this litigation.

The appellant's standing to bring his suit is not challenged.[5] However, the extremely skimpy record, the paucity of legal analysis or argument offered on behalf of the appellant, and the absence of allegation or proof that his own taxes would actually be lower if exemptions were abolished combine to suggest that on the merits the appellant has not demonstrated that the tax exemption practices of New York City adversely affect in any way his own constitutional rights. *Flast v. Cohen* undoubtedly means that taxpayers have the right to raise constitutional questions about the validity of tax laws under the Establishment Clause. *Flast*, however, does not mean that every taxpayer will win every case he brings, or that every taxpayer properly makes out his case merely by proving that he is a taxpayer. The appellant has introduced no evidence whatever of personal or public hurt.

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[5]Cf. *Flast v. Cohen*, 392 U.S. 83 (1968).

He has not even attempted to show that he is constrained in the exercise of his own religion, or that the tax exemption costs the State more than the State gains from the welfare services (as distinguished from worship and preaching) rendered to the public by religious organizations. Compare Bittker, *The Case of the Fictitious Taxpayer: The Federal Taxpayer's Suit Twenty Years After Flast v. Cohen*, 36 U. Chi. L. Rev. 364 (1969), with Davis, *The Case of the Real Taxpayer: A Reply To Professor Bittker*, 36 U. Chi. L. Rev. 375 (1969).

Certainly, the important issue which the appellant asks the Court to decide merits a more illuminating record than the one out of which this appeal emerges. That record "hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases." *Powell v. Texas, supra*, at 522. As in *Kimbrough v. United States*, 364 U.S. 661, it can be fairly said that despite this Court's notation of probable jurisdiction, "a more thorough consideration of the record than . . . [may have been previously afforded] . . ." might justify the conclusion that the highly important and complex constitutional question which appellant presses upon the Court—both in terms of its enormous economic, political and social impact and its significance in the orderly development of constitutional doctrine in the State-Church field—"is not presented with sufficient clarity in this case."

The substantial omissions from the record strongly suggest that the context of this litigation and the record on which it rests are "too fragile a foundation for indulging in constitutional adjudication." *Poe v. Ullman*, 367

U.S. 497, 501 (1961). The nature and importance of the constitutional issues which the Court is called upon to take up in this case deserve, we believe, a firmer adjudicatory base from which to proceed to their ultimate disposition and the possible wide-ranging consequences which might flow from that disposition. "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." *Parker v. County of Los Angeles*, 338 U.S. 327, 333 (1949); *Poe v. Ullman, supra* at 503.

For these reasons, unless the Court is disposed to follow the unbroken precedent of history and of all the courts, including this Court, and affirm the decision of the Court of Appeals of New York, we urge that the Court vacate its order of June 16, 1969 noting probable jurisdiction in this case and grant appellee's earlier motion to dismiss the appeal for want of a properly presented federal question.

II.

The Precise Constitutional Issue To Be Decided

This case presents an important but narrow issue. The question is whether the Fourteenth Amendment prohibits the people of a State, or a State legislature, from choosing to exempt from taxes "real property owned by a corporation or association organized exclusively for . . . religious . . . purposes . . . and used exclusively" for such purposes.[6] At the outset, it is important to stress that the issue is not one of whether the tax exemption in

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[6]N. Y. Const., Art. 16, Sec. 1; Sec. 420, Subd. 1, Real Property Tax Law of New York.

faced with determining the validity of the income and estate tax deductions permitted those who contribute or donate money or property to religious organizations. The precise issue presented in this case, however, undoubtedly does bear upon, and could well determine, the constitutionality of all exemptions voluntarily granted religious organizations from various income, sales, estate, excise taxes and the like.

In summary, the issue is the constitutionality of a legislatively afforded exemption (a) of property owned by a nonprofit religious organization, (b) used exclusively for religious purposes, (c) common to all religious organizations, and (d) shared with a great number of other nonprofit, charitable and educational organizations. In particular, the issue concerns whether a State may, if it so wishes, exempt houses of religious worship from the general real property tax.

III.

America's Undeviating Historical Policy and Practice Of Exempting Religious Property from Taxation.

A. *The Important Place of History in Constitutional Adjudication.* The *amicus* believes that the unswerving historical acceptance of the legality and propriety of real property tax exemptions for church properties in this Country since its formation in 1787 up to the present

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amicus does not defend exemptions from taxation accorded church properties used or operated for commercial purposes and has so advised the Congress and the public. Joint Statement of the National Council of Churches and the United States Catholic Conference, *Hearings on H.R. 13270 (The Tax Reform Act of 1969)* before the Senate Committee on Finance, 91st Cong., 1st Sess., 83 (May 2, 1969) (unofficial print).

time constitutes an unusually compelling argument in support of the constitutionality of such exemptions. Their long-continued existence and universal acceptance, unlike virtually any practice the constitutionality of which has been reviewed by this Court, is a classic illustration of Mr. Justice Holmes' famous observation that: "The life of the law has not been logic; it has been experience."[9] And so it is with great constitutional provisions. In *McGowan v. Maryland*,[10] this Court found "the place of Sunday Closing Laws in the First Amendment's history both enlightening and persuasive."[11] The evidence "of the place" of tax exemptions for religious property "in the First Amendment's history" is, we believe, even more "enlightening and persuasive" in demonstrating that there is nothing constitutionally incompatible between tax exemption and the requirements of that great Amendment. It is undoubtedly true that a constitutional question should not be regarded as settled until it is settled right, as Mr. Justice Brandeis once put it. Nevertheless, equal wisdom is reflected in the statement of his famous colleague, Mr. Justice Holmes, that: "If a thing has been practiced by common consent for two hundred years, it will need a strong case for the Fourteenth Amendment to affect it."[12] As we now show, tax exemptions for church property have been "practiced by common consent for

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[9]Holmes, The Common Law 1 (1945).

[10]366 U.S. 420 (1961).

[11]366 U.S. at 440; see also *Reynolds v. United States*, 98 U.S. 145, 165 (1878).

[12]*Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

two hundred years." The indisputable historical fact is that from the time of the formation of the Republic the Federal and State governments have chosen to afford houses of religious worship exemption from property taxation. That unbroken constitutional tradition should ~~now~~ Not be immutably prohibited by this Court.

B. *Religious Tax Exemptions Existed in the Earliest Days of the Nation.* We begin the story by examining the practices prevailing in the original States at the time the Constitution was adopted in 1789. In point of fact, however, the American practice of exempting religious property existed in colonial days, a time when the established churches were regarded as agencies of the state or town.[13] There is historical evidence that, even in the days when the established church was considered as an instrument or agency of government, houses of worship maintained by other churches which were not part of the establishment were also, by practice, not taxed.[14] Nevertheless, the *amicus* takes as its starting point in setting

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[13]Pfeffer, Church, State and Freedom 183 (1953). As the author of that work notes: "Tax exemption of church property is probably as ancient as taxation itself . . . [and] dates back at least to early Biblical days." See also Antieau, Carroll and Burke, Religion Under the State Constitutions 121 (1965), and 3 Stokes, Church and State In the United States 418 (1950).

[14]Stimson, *The Development of Tax Exemption In South Carolina,* 4 S.C.L.Q. 396, 400 (1952); Van Alstyne, *Tax Exemptions of Church Property,* 20 Ohio St. L.J. 461, 462 (1959). As a Connecticut court once said, the principle of exempting the property of religious institutions "has been inseparably interwoven with the structure of government and the habits of our people, since 1638. . . ." *Yale v. Town of New Haven,* 71 Conn. 316, 332, 42 A. 87, 92 (1899).

out the history of religious tax exemptions in the United States the adoption of the Constitution and the ratification of the First Amendment in 1791, for it is the Constitution and specifically the religion clauses of that Amendment from which this Court must draw its answer to the issue which appellant urges upon it for decision.

The Constitution itself, while conferring the broadest powers of taxation on the Congress, does not refer to tax exemptions. Nor was there any discussion of the practice in the Constitutional Convention, in the petitions requesting enactment of the Bill of Rights, or in the debates on the Bill of Rights.[15] Similarly, the debates in the State conventions preceding ratification of the Constitution produced no informative discussion regarding tax exemptions of church properties.

Following the adoption of the new Constitution and ratification in 1791 of the Bill of Rights, most of the original 13 States soon passed statutes or adopted constitutional provisions specifically exempting religious property from taxation.[16] These statutory exemptions followed a general pattern and collectively establish the early origins of State exemptions in this area during a period of time following close upon the adoption of the

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[15] Antieau, Carroll and Burke, *supra* note 13, at 122; Zollman, *Tax Exemptions of American Church Property*, 14 Mich. L.Rev. 646 (1916); O'Brien, *Government and Religion*, 5 Vill. L.Rev. 335, 347 (1960).

[16] The early tax exemption statutes adopted in the original 13 States are set out in Appendix A of the Supplement filed with this brief.

First Amendment. The early history of the New York policy in affording the real property exemption is discussed in the briefs filed by the appellee and the State of New York as *amicus curiae.* However, to support the point in more detail, the *amicus* in this brief has singled out for fuller treatment the origins and developments of tax exemption for religious property in four other representative States of the original thirteen. These are Virginia, Massachusetts, Maryland and South Carolina.[17] To them we have added the early Federal experience in the newly created seat of the Government, the District of Columbia.

1. *Virginia.* This Court is most familiar with the fact that direct antecedents of the First Amendment may be traced to the early Virginia experience in forging the foundations of religious liberty in that State, especially the part played in that effort by Thomas Jefferson and James Madison.[18] The Virginia experience with religious

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[17]In Massachusetts as in the other New England states, the local congregation was the basic church, whereas in Virginia, Maryland and the Southern States, the parent church or upper hierarchical body was usually considered the basic religious entity. Note, *Judicial Intervention In Church Property Disputes–Some Constitutional Considerations,* 74 Yale L.J. 1113, 1115 (1965). Despite the difference in official attitude regarding who or what was really the church, all of the original States early provided tax exemptions for church property, whatever body had formal title to, or was entitled to prescribe the use of, church property. See Appendix A in the Supplement accompanying the brief of this *amicus.*

[18]*McGowan v. Maryland,* 366 U.S. 420, 437-440 (1961); *Everson v. Board of Education,* 330 U.S. 1, 33-41 (1947) (Rutledge, J. *dissenting*).

tax exemptions is, therefore, especially pertinent in construing the reach, if any, that the First Amendment, through the Fourteenth, may have to such exemptions.

The Virginia story is clear and persuasive. In January of 1786, the Virginia General Assembly, largely under the leadership of James Madison, then one of its distinguished members, adopted a bill, originally drafted by Thomas Jefferson, entitled "An Act For Establishing Religious Freedom".[19] The part which Madison played in that effort, as well as his concomitant exertions in the struggle against the Assessment Bill, which collapsed in committee in December 1785, are set out in detail in Mr. Justice Rutledge's dissenting opinion in *Everson, supra.* The sweep of the historic Bill For Establishing Religious Freedom, authored by Jefferson, sponsored by Madison, and adopted by the Virginia General Assembly in 1786, forbade the establishment of religion and secured its free exercise in Virginia.

Yet, even with the passage of the Bill For Establishing Religious Freedom and the defeat of the Assessment Bill, the fight was not completely over in Virginia. A number of statutes remained on the books, dating back to colonial days in most cases, which by inference or reference recognized the Church of England as an "established church". A statute to eliminate these vestigial statutory provisions was adopted by the Virginia General Assembly on January 24, 1799. The statute was entitled "An Act To Repeal Certain Acts and To Declare the Construction of the Bill of Rights and Constitution Concerning Religion".[20] Its purpose clearly was the final

[19]Hennings, Virginia Statutes At Large 84-86 (1785-1786).

[20]Virginia Statutes At Large, Shepherd's Continuation of Henning 149 (1796-1803).

elimination of all the remaining vestiges of religious establishment in Virginia.

Prior to 1800, the taxing statutes of Virginia had not exempted any classes of property from tax liability. However, on January 23, 1800, with James Madison again sitting as a leading member of the Virginia General Assembly,[21] that body enacted a taxing statute which included the following provision:

> "Provided, That no taxes shall be collected on lands, lots, or other properties belonging to this Commonwealth or to any county, town, *houses for divine worship*, or seminary of learning." (Italics supplied).[22]

Thus, almost a year to the day when Virginia had completed its final mopping up operations in the fight for disestablishment, it saw fit to exempt houses of religious worship from taxation. The birthplace of modern religious liberty in America apparently saw nothing incompatible between complete disestablishment and tax exemptions for religious properties.

A final note might be added to the Virginia story. That Commonwealth has always been one of the States most strict in maintaining the separation of Church and State. For example, a provision of its constitution to this

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[21] Swem and Williams, *A Register of the General Assembly of Virginia, 1776-1918*, 53 (Richmond, 1918). Madison was excused from further attendance at the 1800 session of the House of Delegates after January 22, 1800. However, the statute in question passed the House on January 20, 1800; Journal of the House of Delegates of the Commonwealth of Virginia 75, 98 (1799-1800).

[22] Virginia Statutes At Large, Shepherd's Continuation of Henning 200 (1796-1803).

day prohibits the incorporation of religious societies.[23] However, that same constitution continues the tradition of tax exemption for religious property which had its statutory origins in 1800.[24]

2. *Massachusetts.* Massachusetts was one of the first of the original States to embody authorization for tax exemption for churches within its Constitution. This it did in 1780. The original language has been retained in subsequent amendments and revisions of the Constitution.[25]

The phraseology is somewhat antiquated. The legislature is directed "in all future periods" of the Commonwealth "to cherish literature, sciences and other forms of learning and all seminaries of them." Further, the future legislators were implored to "encourage" both private societies and public institutions which had as their objectives an inculcation of the virtues of "humanity and general benevolence . . . charity, industry, and frugality, honesty and generous sentiments among the people."

Pursuant to this constitutional directive, which has not been changed in substance since 1780, the legis-

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[23]Va. Const., Sec. 59.

[24]*Ibid,* Sec. 183(e). Moreover, the Supreme Court of Virginia has construed the exemptions accorded church properties liberally, holding, for example, as to such property, in contrast to other types of exemptions, that "exemption is the rule and taxation the exception" under "the policy of the State. . . ." *Commonwealth v. Lynchburg Y.M.C.A.*, 115 Va. 745, 747, 80 S.E. 589, 590 (1914).

[25]Mass. Const. (rearranged in 1919 with amendments), Chap. 5, Sec. 2 (1780). See p. 20 of the Supplement filed with this brief.

lature of Massachusetts has provided that certain classes of property used by churches, schools and charity be exempt. "Houses of worship" are exempt along with the pews and other furnishings.[26]

The history of this exemption in Massachusetts is well set forth in Judge Barker's dissenting opinion in *All Saints Parish v. Brookline,* 178 Mass. 404, 59 N.E. 1003 (1901).[27]

> "For a period of 216 years the doctrine that the churchyard and the church were public works was of itself sufficient to secure for them an unbroken exemption from taxation. Until April 1, 1836, there was no statutory exemption of land or building. Yet neither were taxed and for the same reason which, without any statutory declarations to this day has exempted courthouses, jails, houses of correction, schoolhouses and townhouses and city halls, with their grounds, and also highways, canals, and lands and structures within the location of railroads. The only statutory provisions relating, though remotely to the subject, were those which from the year 1799 exempted from taxation, except for parochial purposes, pews and houses of public worship, although the pews were the private property of individuals, which they could lease, mortgage, sell and convey or devise by will at their pleasure, and which could be taken by legal process for the debts of the individual owner."[28]

Continuing, Judge Barker stated, "The revised Statutes for the first time made a statutory provision exempting

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[26]Mass. Code L. A., Ch. 59, Sec. 5, Cl. 11.

[27]The dissent related only to the coverage of the exemption in that case; there was no disagreement regarding its legality.

[28]178 Mass. at 412, 59 N.E. at 1005.

houses of religious worship from taxation. Rev. St. C. 7, Article 5, Cl. 5."[29] He then proceeds to trace the statutory development of the exemption laws for houses of religious worship. These references and the subsequent history of the statutory provisions pertaining to exemptions only reinforce the unbroken nature of the basic exemption accorded to houses of worship.

In general, the exemption accorded houses of worship has been considered to be an outgrowth of achieving the lofty aims set forth in the constitutional language which, in effect, is a mandate to the legislature of the state of Massachusetts. As eminent commentators have noted: "One means the framers of this language obviously had in mind by way of achieving these lofty aims was to *excuse* them, whenever possible, from the burden of taxation."[30] [Italics supplied]

3. *Maryland.* George Calvert founded the colony of Maryland in 1632 in reaction to the widespread religious persecutions in England. Thus, Calvert had as a fundamental principle the theory that government should be truly tolerant of the religious views of its subjects.

Maryland's first Constitution was adopted in 1776, thirteen years before the effective date of the Federal Constitution and fifteen years before the Bill of Rights. The 1776 Maryland Constitution included a Declaration of Rights which contained in Article 33 (now Article 36) the following:

> ". . . wherefore no person ought by any law to be molested in his person or estate on account

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[29] *Ibid.*

[30] Antieau, Carroll and Burke, *supra* note 13, at 126.

> of his religious persuasion or profession, or for his religious practice; . . . nor ought any person to [*sic*] be compelled to frequent or maintain or contribute, unless on contract, to maintain any particular place of worship or any particular ministry;"

Article 34 of the Declaration of Rights (now Article 38) then said:

> "That every gift, sale or devise of land to any Minister, Public Teacher or Preacher of the Gospel, as such, or to any Religious Sect, Order or Denomination, . . . without the leave of the Legislature, shall be void;"

Twenty-two years later, the first *ad valorem* property tax statute was enacted. On January 20, 1798, the Maryland General Assembly passed a bill entitled "An Act for the valuation of real and personal property within this State." That statute began with the following provision:

> "All real and personal property in this state, except property belonging to this state, or the United States, *houses for public worship*, burying-grounds, or property belonging to any county, or to any college, or to any county school . . . shall be valued . . . and shall be chargeable according to such valuation with the public assessment." [Italics supplied] [31]

It is apparent, therefore, that the Maryland General Assembly of 1797 saw no inconsistency between the exemption of "houses for public worship" and the disestablishment provisions of Article 33 or the mortmain provision of Article 34 of the Declaration of Rights contained in Maryland's Constitution of 1776, then in effect.

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[31] Laws of 1797, Ch. 89, Kilty's Laws of Maryland (1785-1799).

Maryland has continuously retained the exemption for houses of public worship in its tax law since 1798.[32] In 1966, the constitutional validity of Maryland's 170-year-old exemption was sustained by the Maryland Court of Appeals.[33] In that year, the same Court adopted a most restrictive interpretation of the First Amendment in a case concerning state aid to church-related educational institutions.[34]

4. *South Carolina.* An examination of the early practices and statutes of South Carolina indicates that the Episcopal Church, being the state or established church of the Colony, was considered to be a public institution and serves to explain the tax exempt status which the Episcopal Church enjoyed along with other public institutions. An Act of 1704 provided for the construction of church buildings for each of the ten parishes in which the Colony was divided. The public treasury bore the cost over and above donations; a specified sum was provided for ministerial salaries.[35]

In 1739, the Colonial Legislature passed the first statutory provision for the exemption of church property other than that of the established church. The applicable portion of the statute reads:

> ". . . lands whereon any churches or other buildings for divine worship or for free schools are

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[32] Article 81, Sec. 9(4), Ann. Code of Maryland (1965).

[33] *Murray v. Comptroller*, 241 Md. 383, 216 A.2d 897 (1966), *cert. den.*, 385 U.S. 816 (1966).

[34] *Horace Mann League v. Board of Public Works*, 242 Md. 645, 220 A.2d 551 (1966), *cert. den.*, 385 U.S. 97 (1966).

[35] 2 S.C. Stat. at L. 236-246.

> erected or built and lands appurtenant to such churches and buildings and free schools. . . ."[36]

One commentator has observed in discussing this exemption:

> "In granting this favor to churches and free schools, the Colonists were expressing the traditional belief that public services were performed by such institutions and their work should be encouraged. An established church being is existence whose function must have been considered properly governmental, it is easy to understand the attitude that other churches also were performing governmental functions and should not be taxed."[37]

A parallel development was the provision in the Revenue Law of 1760, which taxed "all profits of all faculties, professions (clergy excepted), factorage and handicraft trades." Stimson observes that the exemption was a means of increasing the real salaries of clergymen without directly dipping into the public Treasury.[38]

With the advent of statehood, the established church was done away with and the "Christian Protestant Religion" was declared to be the established religion of the state.

The Constitution of 1790 sought to put all churches on an even footing, except that the Episcopal Church retained the property that had been given it by the public while it had been the established church. That same constitution continued the rights and privileges

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[36] *Id.*, at 255-256.

[37] Stimson, *The Development of Tax Exemption in South Carolina*, 4 S.C.L.Q. 396, 400 (1952).

[38] *Ibid.*

(including tax exemption) of churches, religious societies and educational institutions as if "this Constitution had not been altered."[39]

5. *District of Columbia.* Another relevant chapter in the history of tax exemptions during the days of the Country's beginnings is furnished by the District of Columbia. On October 6, 1802, when Thomas Jefferson was President of the United States, the City Council of the District of Columbia adopted a taxing ordinance which, however, exempted, *inter alia,* "houses for public worship."[40] In 1804, with Thomas Jefferson still the President, Congress amended the original Act under which the City of Washington had been incorporated and permitted the exemption to remain.[41] The approval of tax exemptions for church properties within a decade of the ratification of the First Amendment and, unlike the several States, within a territory which was subject to its restrictions and during the Presidential tenure of Thomas Jefferson, warrants the inference that the early City Fathers, as well as the early Congresses, perceived no conflict between a tax exemption for "houses for public worship" and the requirements of the First Amendment.

C. *The Tradition of Religious Tax Exemptions Was Continued In the Civil War Period and Afterwards.* By the time of the Civil War, most of the States had embodied into law, either through constitutional provision

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[39] S.C. Const., Art. VIII, Sec. 2 (1790).

[40] Act of October 6, 1802, Bothwell's Compilations of Laws of Washington (1833).

[41] Act of February 24, 1804, Ch. 142, Sec. 254.

or by statute, or both, the universal practices of granting tax exemptions for religious property and of restricting direct grants to religious institutions. During these years when the Congress imposed direct taxes (beginning with the Act of July 14, 1798), it also uniformly exempted properties which were exempt by State law. This followed an earlier suggestion of Alexander Hamilton.[42] Congress was quite aware of the terms and scope of the various State tax exemptions prior to the passage of federal tax acts, since the Secretary of the Treasury in 1796 filed with Congress a report containing a compendium of the tax laws of each State, including the exemptions then in effect.[43]

After the Civil War had ended, Congress required the Southern States, as a condition precedent for re-entry to the Union, to rewrite their constitutions and submit them for its scrutiny and approval.[44] While nothing was said of tax exemptions for religious property during the Congressional debates on the Fourteenth Amendment, the same Reconstruction Congresses which had initiated, drafted, debated and approved that Amendment by 1870 had approved all of the redrawn constitutions of the former States of the Confederacy. It is significant that in the constitutions of five of these States there was specific provision, either mandatory

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[42] *The Federalist*, No. 36 (Hamilton).

[43] 1 American State Papers (Finance) 414 (1858).

[44] Act of March 2, 1867, 14 Stat. 429; Act of June 25, 1868, 15 Stat. 73; see also Remarks of Thaddeus Stevens, Congressional Globe, 49th Cong., 2d Sess., 2465 (1867).

or permissive in nature, for exemption of church properties.[45]

In the decade beginning 1870, the Liberal League initiated a movement to eliminate the exemptions afforded religious property.[46] This movement apparently reached its high water mark in 1875. In that year, President Grant in his State of the Union message to the Congress suggested a constitutional amendment to declare State and Church "forever separate and distinct . . . and that all church property . . . bear its own proportion of taxation."[47] One week later, Representative Blaine of Maine submitted a proposed constitutional amendment incorporating most of the propositions suggested to the Congress in President Grant's State of the Union message. He did not, however, include President Grant's proposal that tax exemptions for churches be eliminated.[48] In view of Representative, later Senator, Blaine's acknowledged views in favor of the strictest separation of State and Church, the silence of his amendment on the point has special significance. It is clear that the leaders of that day held the firm belief that nothing in the Constitution prohibited religious tax exemption.

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[45] Ark. Const., Art. X, Sec. 2 (1868); N. C. Const., Art. V, Sec. 5 (1868); S. C. Const., Art. IX, Sec. 1 (1868); La. Const., Art. 118 (1868); Fla. Const., Art. XIII, Sec. 1 (1868).

[46] Robertson, Should Churches Be Taxed? 73-74 (1968).

[47] Ames, Proposed Amendments to the Constitution 277 (1897); Antieau, Carroll and Burke, Religion Under State Constitutions, *supra* note 13, at 123.

[48] 4 Cong. Rec. 5190, Part 6 (1875).

President Grant's suggestion had little effect on succeeding Congresses. For example, the constitutions of 10 States admitted to the Union after the adoption of the Fourteenth Amendment contained provisions for limiting the use of public funds in aiding religion but, at the same time, all had provisions for some variety of tax exemption for church properties used for religious purposes.[49] The enabling acts which the Congress passed in admitting each of these States contained a specific proviso that the constitution of a State seeking admission must not be "repugnant" to the Constitution of the United States. It is clear, therefore, that Congress never seriously entertained the notion that the exemption of church property from taxation offended, either in fact or in spirit, fundamental provisions of the Bill of Rights.[50]

D. *From the Blaine Amendment to the Present.* While, as we have stated, the Blaine Amendment never cleared the Congress, the ideas that it incorporated did find favor in a considerable number of the States, either existing or newly admitted to the Union. However, the catalyst which the Blaine Amendment provided the States in adopting constitutional provisions that limited

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[49]See Appendix B printed in the Supplement filed by the *amicus.*

[50]In 1876, President Grant himself signed the enabling act by which Colorado was admitted to the Union with a constitution which expressly exempted from taxation lots and buildings "used solely and exclusively for religious purposes." Colo. Const., Art. X, Sec. 5 (1876). He also signed two District of Columbia statutes, which incorporated provisions affording tax exemptions for religious property, one in 1876 and another in 1877. 16 Stat. 153 (1876) and 17 Stat. 399 (1877).

the expenditures of public funds to aid religion, many of them much more explicit and restrictive than the First Amendment, did not induce them to eliminate the constitutional or statutory authority which sanctioned tax exemptions for ecclesiastical property. An illustrative case demonstrates the point. The Constitution of Iowa contains a provision which reads very closely like the words of the First Amendment. It forbids laws "respecting an establishment of religion or compelling any person to pay . . . taxes . . . for building or repairing places of worship or the maintenance of any minister or ministry."[51] In *Trustees of Griswold College v. State*, 46 Ia. 275, 26 Am. Rep. 138 (1877), the Supreme Court of Iowa held that tax exemptions granted by statute[52] to religious related colleges did not violate the amendment of the Iowa Constitution cited above. Said the Iowa Supreme Court:

> "The argument is, that exemption from taxation of church property is the same thing as compelling contribution to churches to the extent of the exemption. We think the constitutional prohibition extends to the levying of tithes, taxes, or other rates for church purposes, and that it does not include the exemption from taxation of such church property as the legislature may think proper."[53]

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[51] Iowa Const., Art. 3, Sec. 1 (1857).

[52] Iowa Code Ann., Sec. 427.1(9) *et seq.*

[53] 46 Iowa at 282. See also, *Garrett Biblical Institute v. Elmhurst State Bank*, 331 Ill. 308, 163 N.E. 1 (1928), in which the Illinois Supreme Court held the exemption of the Institute from taxation did not violate either the Illinois or the United States Constitutions "either in spirit or letter. . . ." 331 Ill. at 318, 163 N.E. at 4.

Today, as in the beginning, every State in the Nation and the District of Columbia exempts church properties, at least those used for purposes of worship, from taxation.[54] Printed as Appendix B in the Supplement filed with this brief is a detailed compilation of the constitutional and statutory provisions of the various States through which tax exemptions are provided for houses of worship and related religious property. It shows that at the present time the constitutions of 36 States contain either a mandatory or permissive provision for the exemption. In the remainder of the States the exemption is provided by statute.[55]

E. *The Favorable Congressional View of Religious Exemptions.* Until fairly late in our constitutional development, the strictures of the First Amendment were thought to bind only the Federal Government and not the States. Therefore, any summary of the historical treatment of religious tax exemptions would be deficient unless it took into account the Congressional experience. Here, the history, as in the case of the States, is one of long-standing and unbroken approval of tax exemptions for church property. The *amicus* has already discussed the early appearance of such exemptions in the District of Columbia.[56] To that can be added the case of *Gibbons v. District of Columbia,* 116 U.S. 404 (1886),

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[54] *Constitutionality of Tax Benefits Accorded Religion,* Note, 49 Col. L. Rev. 968-69 (1949); Van Alstyne, *Tax Exemptions of Church Property,* 20 Ohio St. L. J. 461 (1959).

[55] See also Van Alstyne, *supra.*

[56] *Supra,* p. 40. See also the illustrative examples of early tariff exemptions for religious property listed in Appendix D printed in the Supplement.

involving an early Congressional exemption from taxation of properties used for purposes of religious worship.[57]

In legislation passed by the Congress since the Civil War, there has been a general policy of providing exemptions and deductions for religious purposes. After the reorganization of the District of Columbia, Congress passed specific exemptions for houses of worship within the District in the Acts of June 17, 1876, 16 Stat. 153, and the Act of March 3, 1877, 16 Stat. 399. Similar exemptions still exist in the District of Columbia to this date.[58] The ill-fated Federal Income Tax of 1894,[59] provided an exemption for religious institutions. The exemptions were carried over in the income tax laws enacted after the Sixteenth Amendment was adopted, and the principle has been effected in other types of revenue legislation, such as the estate and gift tax.[60] Additional tax exemptions currently afforded religious organizations by Federal law are set out in Appendix C of *amicus'* Supplement.

F. *The Ineluctable Conclusion from History.* This Court has often turned to relevant history in the adjudication of constitutional issues. In the sphere of the First Amendment, it has emphasized history both to strike down abridgements of the freedoms guaranteed

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[57] Discussed *infra*, p. 53.

[58] 47 D.C. Code 801 a (1967).

[59] 28 Stat. 509 (1894).

[60] I.R.C. (1954), Secs. 501 (c)(3), 2055 and 2522.

by that Amendment,[61] and to uphold statutes challenged under that great constitutional provision.[62] Surely, the Court will again find influential the lessons of the history which bears on the issue now before it. In constitutional law, as elsewhere, "doctrine is illuminated by history." *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949).

That history is undebatable. From the time the Nation began, every State and Federal legislative body that has taken the question up has come down on the side of permitting tax exemption for church properties used for religious purposes. The members of all those legislatures took and were bound by, their oath or affirmation to support the Constitution as prescribed by Article VI thereof. Their firm view of the constitutionality of the practice is thus obvious. Moreover, unlike other historical practices of much less ancient vintage, such as Bible reading, prayers in public schools or the bus transportation of parochial school students, which some States permitted and other States denied, the history of the permissibility of religious tax exemptions has remained to the present time without a single adverse judicial pronouncement with respect to its legality under State or Federal constitutional provisions.

Finally, as a learned commentator has conceded, the religious tax exemptions sanctioned "during our history . . . [have] not in fact begun a series of steps toward

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[61] *Near v. Minnesota*, 283 U.S. 697, 713 (1931) ("liberty of the press as historically conceived and generated").

[62] *McGowan v. Maryland*, 366 U.S. 420, 440 (1961) (". . . we find the place of Sunday Closing Laws in the First Amendment's history both enlightening and persuasive").

the establishment of religion."[63] Whatever efficacy *in terrorem* arguments might have in other controversies over the interpretation and reach of the Non-Establishment Clause, in the light of the indisputable history of religious tax exemptions, such arguments have no place in the resolution of the question which the Court has before it for decision.

We close the argument from history as we began it—with a quotation from Mr. Justice Holmes: "Upon this point a page of history is worth a volume of logic."[64] Here, all the pages of the relevant history tell the same story: there is nothing in the Non-Establishment Clause or in the Fourteenth Amendment that was intended to prohibit the universal practice of exempting church properties from taxation.

IV.

The Case Precedents Unanimously Support Tax Exemptions of Church Property

A. *The Force of Precedent.* In the preceding section of this brief, the *amicus* appealed to the undeviating history of the legislative practice of permitting tax exemptions for church property as reason for not holding such exemptions to be unconstitutional at this late day. In the section which follows we "fortify [the historical] principle with precedent."[65] As Mr. Justice Clark once said in another context:

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[63]Paulsen, *Preferment of Religious Institutions In Tax and Labor Legislation,* 14 Law & Contemp. Probs. 120, 147 (1949).

[64]*New York Trust Co. v. Eisner,* 256 U.S. 345, 349 (1921).

[65]Holmes, The Common Law, *supra* note 9, at 209.

> "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[66]

As we now show, not only does the practice of permitting tax exemption for religious property exist in *all* of the States, but that practice has been upheld as constitutional by *every* court, State or Federal, including this Court, that has ever passed upon the issue. *Stare decisis* may have limitations when the doctrine is invoked in the adjudication of constitutional questions, and a "constitutional interpretation that is wrong should not stand." *Connecticut General Life Ins. Co. v. Johnson,* 303 U.S. 77, 85 (1938). Nevertheless, the accumulated force of unanimous judicial opinion, consistently adhered to by the courts of the Country, and voiced many times from colonial days to the present, constitutes a formidable basis from which to argue for the continued constitutional permissibility of tax exemptions for church properties.

B. *The State and Lower Court Decisions Unanimously Support the Exemptions.* A careful search of the reported decisions from 1791 to the present confirms the conclusion reached in 1956 by the Supreme Court of California, in one of the leading State court decisions on the issue, that:

> "No case has been found holding that the granting of such exemptions is contrary to State or

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[66] *Leland v. Oregon,* 343 U.S. 790, 798 (1952).

> Federal constitutional provisions prohibiting the support or establishment of religion, and, when the matter has been raised, the exemptions have been upheld."[67]

That was true in respect to the State court cases decided before this Court's landmark decision in *Everson v. Board of Education*, 330 U.S. 1 (1947). Representative cases are cited below.[68] Similarly, the State courts which have been called upon to take up the issue of religious tax exemptions after this Court spoke in *Everson* have continued to uphold tax exemptions for church properties, finding nothing in the strict "wall of separation" doctrine which the Court enunciated in that case to require the elimination of such exemptions because of the Non-Establishment Clause of the First Amendment.[69]

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[67] *Lundberg v. County of Alameda*, 46 Cal.2d 644, 298 P.2d 1, 7 (1956), *app. dism. sub nom. Heisey v. County of Alameda* 352 U.S. 921 (1956); see also *General Finance Corp. v. Archetto*, 93 R.I. 392, 176 A.2d 73, 77 (1961), *app. dism.* 369 U.S. 423 (1962).

[68] *Congregational Society v. Ashley*, 10 Vt. 241, 245 (1838); *Orr v. Baker*, 4 Ind. 86 (1853); *State v. Collector of New Jersey*, 24 N.J.L. 108, 120 (1853); *Trustees of Griswold College v. Iowa*, *supra* note 53; *State v. Alabama Educational Foundation*, 231 Ala. 11, 163 S. 527 (1935); *Trustees of First Methodist Episcopal Church v. City of Atlanta*, 76 Ga. 181, 193 (1886); *Rice Co. v. Bishop Seabury Mission*, 90 Minn. 92, 95 N.W. 882 (1903); *Yale University v. Town of New Haven*, 71 Conn. 316, 42 A. 87 (1899); *St. Barbara's Church v. City of New York*, 243 App. Div. 371, 277 N.Y. Supp. 538 (1935); *Commonwealth v. Y.M.C.A.*, 116 Ky. 711, 719, 76 S.W. 52[illegible] (1903); and *Y.M.C.A. v. Douglas Co.*, 160 Neb. 642, 646, 83 N.W. 924, 926 (1900).

[69] *General Finance Corp. v. Archetto*, 93 R.I. 392, 176 A.2d 73 (1961), *app. dism.* 369 U.S. 423 (1962); *Lundberg v. County*

The United States Court of Appeals for the District of Columbia Circuit also had occasion to pass upon a collateral aspect of the issue in an opinion written by the present Chief Justice of this Court. The case involved the question of whether the real property tax exemption afforded religious organizations extended to one which denied the existence of a supreme being. In deciding that the exemption did cover such a religious group, the court said:

> "Congress in granting tax exemptions under this statute like most of the states, was giving expression to a broad legislative purpose to grant support to elements in the community regarded as good for the community . . . . To construe exemptions so strictly that unorthodox or minority forms of worship would be denied the exemption benefits granted to those conforming to the majority beliefs might well raise constitutional issues."[70]

The precise rationales upon which the State and lower Federal courts unanimously arrived at the same conclusion concerning the constitutionality of tax exemptions for church property have varied. Some courts seem to rest their holdings on the fact that the benefit received by the religious denomination as a result of the tax exemption was "incidental to the achievement of a public

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of Alameda, 46 Cal.2d 644, 298 P.2d 1 (1956), *app. dism. sub nom. Heisey v. County of Alameda* 352 U.S. 921 (1956); *Murray v. Comptroller of the Treasury*, 241 Md. 383, 216 A.2d 897 (1966), *cert. den.* 385 U.S. 816 (1966); *Fellowship of Humanity v. County of Alameda*, 153 Cal.2d 673, 315 P.2d 394, 408 (1957); *Missionaries of Our Lady of La Salette v. Michaliski*, 15 Wis.2d 593, 113 N.W.2d 593 (1955).

[70] *Washington Ethical Society v. District of Columbia*, 101 App. D.C. 371, 373, 249 F.2d 127, 129 (1957).

purpose." *Lundberg v. County of Alameda, supra,* at 7. Other courts apparently drew their support from the fact that the activities conducted by religious denominations, like the activities of other exempted organizations, represented programs which "are thought to be in the public interest and welfare." *Washington Ethical Society v. District of Columbia, supra,* at 129. And still others, obviously impressed with the antiquity and universality of the practice and its characteristic of State-Church accommodation, wished to avoid "a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people." *General Finance Corp. v. Archetto, supra,* at 78.

Whatever the exact bases of particular decisions, the point is that every state and federal court that has ever dealt with the issue from 1791 to the present day has upheld the constitutionality, under State and Federal constitutional provisions, of the traditional American practice of affording exemptions from State taxation for church properties. Like the lesson drawn from history, the imposing array of State and lower Federal court precedents supports the decision of the New York courts in this case. Mr. Justice Cardozo once said that the "power of precedent, when analyzed, is the power of the beaten track."[71] Here, the beaten track marked out by the precedents shows no detours, side roads, or even aberrational departures in upholding tax exemptions for churches.

C. *The Precedents Sustaining Religious Tax Exemptions in This Court.* Prior to its decision in the *Everson*

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[71] Cardozo, Growth of the Law, 62 (1924).

case, this Court apparently had been presented with only one opportunity to pass upon a religious tax exemption within the context of the First Amendment.[72] In that case, the Court acknowledged in *dicta* that in the exercise of the legislative power to classify and to exempt, including the exemptions for church buildings and grounds, "Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, . . ."[73] However, *Gibbons v. District of Columbia* cannot fairly be regarded as a controlling precedent for the proposition that religious tax exemptions are not barred by the First Amendment.

During the pre-*Everson* period, also, the Court frequently had before it cases raising the claim of unreasonable classifications on the part of State taxing authorities in alleged violation of the Equal Protection Clause of the Fourteenth Amendment. In several of these, the Court used the exemption for churches as an example of a reasonable and nondiscriminatory method of adjusting a system of taxation consistently with the Equal Protection Clause. Perhaps the case most cited is *Bell's Gap R. Company v. Pennsylvania*, 134 U.S. 232 (1890). Mr. Justice Bradley stated for the Court:

> "The provision in the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the law was

[72] *Gibbons v. District of Columbia*, 116 U.S. 404 (1806). See also *Bishop of Nesqually v. Gibbon*, 158 U.S. 155 (1895) where, again in *dicta*, the Court made reference to the secular benefits underlaying the "principle that exempts from taxation the property of religious organizations," 158 U.S. at 171.

[73] 116 U.S. at 408.

> not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. *It may, if it chooses, exempt certain classes of property from any taxes at all, such as churches,* libraries and the property of charitable institutions."[74] [Italics supplied.]

The Court, quoting Mr. Justice Bradley's language, made the same point in several other decisions. *Magoun v. Illinois Trust and Savings Bank,* 170 U.S. 283, 295 (1898); *Rogers v. Hennepin Co.,* 240 U.S. 184, 192 (1916). Mr. Justice Bradley's words were also quoted In *Flint v. Stone Tracy Co.,* 220 U.S. 107, 160 (1911), a case involving the corporation tax which Congress had imposed by virtue of provisions of the Tariff Act of 1909.[75] In none of these cases, however, did the parties raise, or the Court perceive, any First Amendment problem for religious tax exemptions, including the *Flint* case, *supra,* in which the taxing power of the Congress was at issue.

Following the *Everson* case, however, the Court has had at least three prior opportunities to decide the issue raised on the instant appeal. In two instances this Court upheld the exemption on the merits. In the third it denied *certiorari,* allowing a decision by the highest court of Maryland in favor of the exemption to stand. The first was *Lundberg v. County of Alameda,* 46 Cal.2d 644, 298 P.2d 1 (1956), *app. dism. sub nom. Heisey v. County of Alameda* 352 U.S. 921 (1956). In that case, California tax exemptions for religious schools were unsuccessfully challenged in the courts of that

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[74] 134 U.S. at 237.

[75] 36 Stat., Ch. 6, 11, 112-117 (1909).

State on First Amendment grounds. The Supreme Court of California held that:

> "[E]ven if we regard the exemption as benefiting religious organizations, it does not follow that it violates the First Amendment. The practice of granting tax exemptions benefiting religious sects began in the colonial period. Today, at least some tax exemption for religious groups is authorized by statutory or constitutional provisions in every state and the District of Columbia, as well as by federal law. No case has been found holding that the grant of such exemptions is contrary to state or federal constitutional provisions prohibiting the support or establishment of religion, and where the matter has been raised, exemptions have been upheld."[76]

This Court dismissed the appeal "for want of a substantial federal question." 352 U.S. 921 (Black, J. and Frankfurter, J., *dissenting*).

Again, in *General Finance Corp. v. Archetto*, 93 R.I. 392, 176 A.2d 73 (1961), *app. dism.* 369 U.S. 423 (1962), the Court dismissed, "for want of a substantial federal question," an appeal taken from a unanimous decision of the Rhode Island Supreme Court which had upheld tax exemptions for religious bodies, although Mr. Justice Black was of the opinion that probable jurisdiction should have been noted. Finally, in *Murray v. Comptroller of the Treasury*, 241 Md. 383, 216 A.2d 897 (1966), *cert. den.* 385 U.S. 816 (1966), the Court denied a petition for *certiorari* seeking review of a decision of the Court of Appeals of Maryland upholding tax exemption for structures used exclusively for public worship.

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[76] 298 P.2d at 7.

While the Court's denial of *certiorari* in the *Murray* case may not be taken as any expression of opinion by this Court upon the merits of the decision rendered by the Maryland court,[77] its decisions in the *General Finance* and *Heisey* cases are of very different dimension. When this Court dismisses an appeal for want of a substantial question, it is deciding the case on its merits.[78] Moreover, both the Rhode Island Supreme Court in the *General Finance* case and the California Supreme Court in the *Heisey* case considered and rejected the argument that the First Amendment barred the religious tax exemptions involved in those cases. Therefore, the *General Finance* and *Heisey* cases must be counted among the list of precedents provided by the courts of the Nation in sustaining, either directly or indirectly, the validity of exemptions for church property either under the First Amendment or analogous provisions of State constitutions. The list is unbroken, in the State courts, in the lower Federal courts, and in this Court. In this important respect, exemptions for church property are distinguished from other types of State-Church involvements in which certain forms of government assistance have been upheld in some cases and struck down in others.[79]

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[77] *Wade v. Mayo*, 334 U.S. 672, 680 (1948).

[78] *Barton v. Sentner*, 353 U.S. 963 (1957); Stern & Gressman, Supreme Court Practice 164 (3d Ed.).

[79] State supplied sectarian textbooks were upheld by this Court in *Cochran v. Board of Education*, 281 U.S. 370 (1930) and in *Board of Education v. Allen*, 392 U.S. 236 (1968), but denied by Oregon under its own constitution in *Dickman v. School District No. 620*, 230 Ore. 238, 366 P.2d 533 (1961). In *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court sustained the practice of providing bus transportation by State

Moreover, unlike the background preceding this Court's comparatively recent landmark decisions in the areas of civil rights and reapportionment, there is not only present here a long continued, completely consistent history and unbroken chain of judicial precedents, but also absent in this instance are any compelling demands of the existing social order for the vindication of fundamental constitutional rights such as existed in those historic cases. Where history and the course of judicial decisions point in uncertain directions,[80] the

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or local authorities for all pupils, including those attending religiously-related schools. On the other hand, some State courts have reached the opposite result under the provisions of their own constitutions. *Gurney v. Ferguson,* 190 Okla. 254, 122 P.2d 1002 (1942); *Mitchell v. Consolidated School Dist. No. 201,* 17 Wash.2d 61, 135 P.2d 79 (1943). Again, grants for neglected and dependent children in denominational homes and institutions have been upheld in some States, *Schade v. Allegheny Co. Institution District,* 386 Pa. 507, 126 A.2d 911 (1956), while tuition payments were set aside in another, *Swart v. South Burlington Town District,* 122 Vt. 177, 167 A.2d 514 (1960), *cert. den. sub nom. Anderson v. Swart* 366 U.S. 925 (1961).

[80]Thus, it can be fairly maintained that this Court's repudiation in 1954 in *Brown v. Board of Education,* 347 U.S. 483, of the invidious "separate but equal" concept approved in *Plessy v. Ferguson,* 163 U.S. 537 (1896), apart from its long overdue recognition of the gross injustice of such a policy, represented a return to the original historical purposes of the post Civil War amendments, as exemplified by the Court's earlier decision in *Strauder v. West Virginia,* 100 U.S. 303 (1879). Dixon, Democratic Representation 141 (1968). Similarly, however revolutionary *Baker v. Carr,* 369 U.S. 1, and the ensuing 1964 *Reapportionment Cases,* 377 U.S. 533 *et seq.*, may have appeared to some critics, earlier decisions of the Court, *Wood v. Broom,* 287 U.S. 1 (1932), and *Smiley v. Holm,* 285 U.S. 355 (1932), can be read to sustain its jurisdiction to take up and decide claims of legislative malapportionment. Moreover, the early history of the United States, at least well into the second half of the Nine-

Court is correct in interpreting basic constitutional provisions in the context of the present national social structure, especially when not to do so would sacrifice present justice to a past history, however lamentable. On the other hand, when, as in the case at bar, an undeviating history, unbroken judicial precedents and the realities of the existing social structure all support the continuation of practices deeply imbedded in the mores of the people and universally accepted, we believe that sound constitutional construction dictates that such practices be upheld and not outlawed by this Court.

V.

The New York Exemption Is Fully in Accord With This Court's Decision in *Everson*

Solidly grounded in legislative history and judicial precedent, religious tax exemptions also draw firm constitutional support from a diversified array of Church-State decisions by this Court. The modern development of the religious guarantees of the First and Fourteenth Amendments begins with the Jehovah Witnesses' cases of the early 1940's. That development has continued steadily through such landmark decisions as *Everson, McGowan* and *Schempp.*[81] If one fact stands out clearly

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teenth Century, also supports the proposition that representation in legislative bodies was to be based substantially on population. McKay, Reapportionment: The Law and Politics of Equal Representation 9-98 (1965).

[81] *Everson v. Board of Education,* 330 U.S. 1 (1947); *McGowan v. Maryland,* 366 U.S. 420 (1961); *School District of Abington Township v. Schempp,* 374 U.S. 203 (1963).

from this development, it is the perennial concern of this Court to restrict the government to secular activities and to protect the religious freedom of individuals and institutions. Religious tax exemptions of the type involved in this case make an enormous contribution precisely to the secularity of government and to the religious liberty of all citizens and organizations.

In his argument against these exemptions, appellant seeks to derive support from certain statements by this Court in *Everson*. He appears to rely principally, if not solely, on the "no aid to religion" language of *Everson* in order to demonstrate the constitutional impermissibility of the New York type of religious tax exemption.[82]

The short answer to this argument from the *Everson* language is that appellant has taken absolutely no cognizance of the rest of the *Everson* opinion, of the decision actually reached in the *Everson* case, or of the other Church-State decisions rendered by this Court.

At the outset it should be noted that the *Everson* opinion was never intended as a comprehensive treatise on the constitutionality of the many relationships between religion and government in our country. The precise question before the Court in *Everson* was whether the religious guarantees of the First Amendment, as incorporated in the Fourteenth, precluded a State from providing a comprehensive scheme of safe transportation to *all* school children, including those attending parochial schools. Accordingly, the "no aid" language of *Everson* must be read in the context of this issue—an issue, not

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[82]Cf. Brief for the Appellant, pp. 6-7.

of *exemption* from a general secular law, but of *inclusion* in a general affirmative program of secular governmental services.

In *Everson*, the Court did not address itself clearly in any way to the question of which religious exemptions from general secular laws are mandatory, permissible or forbidden by the First and Fourteenth Amendments. On the other hand, both nine and fifteen years after the *Everson* decision, this Court dismissed attacks on the New York type of tax exemption for lack of a substantial federal question.[83] Moreover, the Court has quite explicitly addressed itself to many phases of the constitutionality of religious exemptions from general secular laws in a number of cases both before and after *Everson*.[84] It is obvious, therefore, that any argument against the New York type of exemption that is based solely on the "no aid" language of *Everson* is an argument that takes the language out of its proper constitutional context.

Moreover, appellant's reliance on the "no aid" language in *Everson* overlooks the equally important language, in the immediately succeeding paragraph of the opinion, that explains the constitutional prohibitions on

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[83] *Heisey v. County of Alameda*, 352 U.S. 921 (1956); *General Finance Corp. v. Archetto*, 369 U.S. 423 (1962).

[84] *Jones v. Opelika*, 316 U.S. 584 (1942), *reversed on rehearing* 319 U.S. 104 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Board of Education v. Barnette*, 319 U.S. 624 (1943); *Zorach v. Clauson*, 343 U.S. 306 (1952); the *Sunday Closing Law Cases*, 366 U.S. 420, 582, 599, 617 (1961); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); and *Sherbert v. Verner*, 374 U.S. 398 (1963).

discrimination *against* religion.[85] And somewhat later in the opinion, the Court affirms flatly that State Power "is no more to be used so as to handicap religions, than it is to favor them."[86] In short, *Everson* stands for "no hurt" just as much as for "no aid." Appellant has attempted to make the "no aid" language a substitute for the First and Fourteenth Amendments. This was certainly not the intention of the Court.

Finally, appellant offers no reconciliation of the "no aid" language with the result actually reached by the Court in *Everson.* Safe transportation was upheld for all school children, even though it may have encouraged and assisted some parents in choosing a parochial rather a public school. The "no aid" language, therefore, cannot be read as a literal, absolute test.

This is all the more evident in light of the Court's acceptance in *Everson* of the legitimacy of the universal practice of providing fire and police protection, sewage facilities, and the use of streets and sidewalks to religious organizations in common with the rest of the community. Such services, "so separate and so indisputably marked off from the religious function,"[87] are not inconsistent with the "no aid" language of *Everson* because that language was aimed to suppress such Establishment practices as compulsion of attendance at religious services, official professions of faith, the imposition of tithes and taxes for churches and ministers, and criminal pun-

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[85] 330 U.S. at 16.

[86] 330 U.S. at 18.

[87] *Ibid.*

ishments and civil disabilities for religious dissenters.[88] These are the kinds of "aid" that the First and Fourteenth Amendments clearly forbid.

On the other hand, when government provides its general secular services to churches as part of the general public in our society, *Everson* finds no constitutional bar. *Everson* mentions "the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion."[89] The *Everson* result, however, affirms that the line exists, and that it is a line of great constitutional significance.

In the case at bar, the City and State of New York are simply providing the same secular services to churches that they provide to all other elements in the community. Accordingly, the "no aid" language of *Everson* has no determinative relevance in this controversy. If the New York exemption is to be struck down on the ground that it "aids" religion in a constitutionally forbidden manner, this Court must go immensely further than the *Everson* decision ever dreamed.

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[88]See the Court's discussion of the background of the First Amendment, 330 U.S. at 8-16.

[89]330 U.S. at 14.

VI.
The New York Exemption Is Fully in Accord With This Court's Decision in *Schempp*

Everson was decided in 1947; *Schempp* was decided in 1963. In the intervening sixteen years this Court decided a number of Church-State controversies ranging from religious instruction in the public schools to public observance of Sunday as a common day of rest. Throughout this period of constitutional development, some litigants in this Court have persisted in urging an absolute and literal extension of the "no aid" passage. Their persistence has been unavailing. In *Schempp*, this Court repeated the language of *Everson* and gave it a refined interpretation:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[90]

The first case cited by *Schempp* to support this test is *Everson v. Board of Education.*

Any doubt that might have lingered about the relationship of *Schempp* to *Everson* was settled last year by this Court's decision in *Board of Education v. Allen.*[91] Once again, the question was whether the Fourteenth Amendment permits a State to extend a secular educational benefit (the free loan of secular textbooks) to all

[90] 374 U.S. at 222.

[91] 392 U.S. 236 (1968).

school children, including parochial school children. In answering this question, the Court did not content itself with simply asking whether the State program resulted in aid to religion. The Court acknowledged that there would be some incidental religious effects, but cited *Everson*, applied the *Schempp* test and upheld the lending program.

It is manifest, therefore, that if appellant's basic argument is the "no aid" passage from *Everson*, his case must fail. Proof that a governmental program results in some type of aid to religion may raise a constitutional question but does not settle it. Appellant has provided no basis for settlement but an absolute and literal extension of the "no aid" language, an application that the Court has steadfastly rejected from *Everson* to *Schempp* to *Allen*.

It remains true, however, that the *Schempp* test "is not easy to apply," as this Court frankly acknowledged in *Allen*.[92] Nevertheless, *amicus* believes that New York's religious tax exemption satisfies the *Schempp* test.

A. *Application of the Schempp Test.* The *Schempp* test requires a secular purpose and a primary secular effect that neither advances nor inhibits religion. New York has exempted the property of religious organizations that is used exclusively for religious purposes. In applying the *Schempp* test to this exemption, a fundamental distinction must be made between two types of religious organizations:

(1) Organizations exclusively concerned with houses of worship;

[92] 392 U.S. at 243.

(2) Organizations that, in addition to conducting a house of worship and other "exclusively religious" activities, also conduct "service activities" (such as caring for the sick, the poor, the blind, the ignorant, the orphaned and the elderly) that are of immense benefit to the secular general welfare.

With respect to the second category of religious organizations, it is manifest that the *Schempp* test is fully satisfied. The services rendered by such organizations are of inestimable benefit to the community. In granting tax exemption to such organizations, the legislature intends to encourage, and actually does encourage, the development of such services. Moreover, the legislature makes certain that the private charitable organization that is infused and energized by religious belief is in no way put at a disadvantage with respect to the private charitable organization, also tax exempt, that is wholly secular or militantly atheistic in its motivation.

It can truly be said, with respect to religious organizations that conduct schools, hospitals, orphanages and homes for the aged, that tax exemptions have a high secular purpose and that there is a direct, primary and secular benefit to the community, an effect that is wholly independent of any religious effects of the exemption statute. Thus, the *Schempp* test is fully satisfied. Short of extreme emergencies, no community in its right mind would reduce the resources of any private nonprofit organizations that feed the hungry, clothe the naked and care for the sick. And diminution in the services these organizations render would have to be offset, at least in most instances, by increased services from the State.

Since private nonprofit organizations, especially religious organizations, operate to a substantial extent on the basis of freely donated services by their members, and since the State would have to pay all of its employees at the market rate, there can be no doubt that it would cost the community far more to provide these services at public expense than to encourage their contribution by private nonprofit agencies, regardless of the religious or secular character of their inspiration.

What, however, of the religious organization that is engaged exclusively in divine worship? Its activities are not only "exclusively for religious purposes"; they are also "exclusively religious" in the sense that it is no part of the ordinary business of government to supply them.[93] If the religious faith of the American people were to wane tomorrow, and every sanctuary and synagogue in the land were to disappear, the hand of government could not be lifted to restore what the people had abandoned. What secular purpose, what independent secular effect, is there then in the grant of an exemption to a religious organization whose existence and survival are constitutionally committed to the free choice of citizens, not to the government?

In exempting such organizations, New York intends and achieves at least three secular effects: (1) fostering the objectives of the separation of Church and State;

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[93]As this Court noted in *Schempp*, governmental regulation of the "temporal and geographic environment" of military personnel may justify public provision of voluntary religious services. 374 U.S. at 226, n. 10. The same would seem to be true of the situation of patients in public hospitals and of prisoners in jails and penitentiaries.

however, that an exemption may be granted, not to encourage an institution, but to *abstain* from unnecessary interference with it.

There are at least two distinctly different types of private nonprofit organizations: (a) those that provide services that the government would have to provide, or might lawfully choose to provide, if the private organizations did not exist; and (b) those that are engaged in activities outside the constitutional scope of governmental authority. In dealing with organizations of the first type, government may stimulate their growth through exemptions, grants and other deliberately favorable laws.

In dealing, however, with organizations of the second type, government's functions are much more limited. Government cannot finance them directly, but it must at least provide the legal framework for their existence. Government should also abstain from unnecessary interference with their growth and activities. Exemptions are an eminently suitable means for this non-interference.

It cannot be emphasized too much that American constitutional law is built on the bedrock conviction of the people that government should be limited in its purposes, powers and activities. Nowhere is the role of government more limited than in the sphere of fundamental opinions and beliefs. Religion is the prime example of this sphere, but not the only one. Philosophy is another. In an era of expanding government, and especially of heavier taxation to support a wide variety of social services, the government should never lose sight of the impact of its tax policies on organizations whose activities are constitutionally outside its ken. When the

government holds back its taxing power with respect to these organizations, it is simply recognizing its own limited and strictly secular competence. Such exemptions do not signify governmental approval–rather, they guarantee governmental neutrality.

Finally, tax exemptions of houses of worship have a third secular purpose and effect through the legislative choice of economically suitable subjects of taxation. The fundamental purpose of the tax laws is to raise revenue, and to raise it fairly and equitably. Purely economic considerations justify many types of exemptions and exclusions from tax liability. There is no general constitutional principle that every piece of property must pay taxes.[94] Exemptions are not universally acts of legislative grace; they may be, and often are, dictated by purely economic considerations of efficiency in the administration of the tax laws and of the relationship between the taxable subject and the production of wealth.

With relation to charitable nonprofit organizations in general, and houses of worship in particular, exemptions from the *ad valorem* property tax have a strictly secular economic justification. It is neither fair nor reasonable to assess property devoted to nonprofit purposes on the basis of what the property would bring if devoted to commercial purposes. It would be ridiculous to assess a church on the same basis as a farm or factory. The difficulty of devising a suitable assessment formula for

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[94]See the excellent discussion of this point, and of religious tax exemptions in general, in Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development–Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 544-54 (1968).

church property devoted to worship fully justifies the exemption of such property from the *ad valorem* tax.

Moreover, property devoted to nonprofit purposes, and particularly to religious purposes, does not generate income. It is a necessary expense for the conduct of the nonprofit purpose, religious or secular. State legislatures have recognized this fact clearly by granting exemption to property actually used for religious purposes but denying it to property owned by churches but used commercially for the production of income.

Viewed in the light of these secular purposes and effects, the New York exemption fully satisfies the *Schempp* test. Accordingly, there is ample justification for holding that this exemption falls within the broad discretionary area that this Court has often recognized as a necessary attribute of the Federal and State legislatures in apportioning the burden of taxation.

B. *Is the Schempp Test Fully Applicable?* The *Schempp* test represents the culmination of a long effort by this Court to find a suitable touchstone for the constitutionality of governmental programs and expenditures that affect religion and religious institutions. *Amicus* is doubtful, however, that the Court intended the literal thrust of the *Schempp* test to apply to the area of exemptions for religious reasons from general secular laws. For example, the same day that this Court decided *Schempp*, it also decided *Sherbert v. Verner*.[95]

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[95] 374 U.S. 398 (1963). Mr. Justice Brennan, who wrote the opinion for the Court in *Sherbert*, stated unequivocally in his concurring opinion in *Schempp*: "Nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions,

In holding that South Carolina was compelled by the Fourteenth Amendment to grant an exemption to a Seventh Day Adventist from one of the provisions in the unemployment compensation laws, the Court did not rest its decision in any way on the language of the *Schempp* test. Quite different considerations governed the Court's decision: religious equality, the substantiality of the burden on the woman's practice of her religion, and the extent to which the exemption would interfere with the State's administration of its unemployment program.

Moreover, it is fairly manifest from other decisions of this Court that the *Schempp* test was not intended as the unique and universal touchstone of the constitutionality of all relationships between the government and religion. Last January, this Court reaffirmed that the Constitution forbids the use of the "change of doctrine" test in the judicial settlement of church property controversies.[96] In its opinion, the Court cited *Schempp* solely for the propositions that "the First Amendment enjoins the employment of organs of government for essentially religious purposes" and that the same amendment "prohibits a State from employing religious organizations as an arm of the civil judiciary to perform

along with many secular charities and nonprofit organizations." 374 U.S. at 301. It is also noteworthy that the majority opinion in *Schempp*, although silent on the subject of religious tax exemptions, expressly reserved decision on the subject of governmental provision of voluntary religious services to personnel in the armed forces. 374 U.S. at 226, n. 10. It is evident, therefore, that the majority had at least one reservation about the universal application of the "secular purpose and primary secular effect" doctrine.

[96] *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969).

the function of interpreting and applying State standards."[97] The governing principles used by the Court in outlawing the "change of doctrine" test in the *Hull Church* case are taken entirely from *Watson v. Jones,*[98] as qualified by *Gonzalez v. Archbishop,*[99] and erected into constitutional status by *Kedroff v. St. Nicholas Cathedral*[100] and *Kreshik v. St. Nicholas Cathedral.*[101]

Church property disputes illustrate the inevitable complexity of American Church-State relationships and the impossibility, in some areas of Church-State contact, of defining the constitutional standard of "neutrality" simply in terms of avoiding "help" or "hurt" to religion. When a church congregation splits in dissension and both groups claim the property in the civil courts, government is compelled to act. No matter which side wins the case, government has "helped" one religious group and "hurt" another. Moreover, no matter what secular standard of decision the government adopts, the effect on both religious groups is immediate and substantial.

Taxation is another area in which the contact between government and religion is unavoidable and substantial. In common understanding, at least, taxation "hurts" and exemption "helps." In such circumstances, where the effects on religion are immediate, substantial and unavoidably helpful or hurtful, the *Schempp* test does

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[97] 393 U.S. at 449.

[98] 80 U.S. 679 (1871).

[99] 280 U.S. 1 (1929).

[100] 344 U.S. 94 (1952).

[101] 363 U.S. 190 (1960).

not provide a distinct guideline. The *Schempp* test was especially designed to govern situations in which the government asserts a secular justification for affirmative public activities and expenditures. As such, it has served well to draw a clean line between *forbidden* use by government of religious means for secular ends, and *permissible* use by government of secular means, to take a case, for the improvement of secular education of all school children, regardless of the secular or religio-secular character of the school they attend.

Moreover, the requirement of the *Schempp* test that there be a secular primary effect that neither advances nor inhibits religion makes it doubtful that the Court intended the test to apply to situations in which a State, out of deference to religious convictions or status, grants an exemption from a general secular law. When government grants such an exemption, the religious effect is immediate and deliberate. Although such exemptions can and do have secular purposes and effects, as *amicus* has shown above, it seems somewhat artificial and strained to justify such exemptions on the basis of a careful distinction between their religious and secular effects, at least as those terms are commonly understood. That distinction is constitutionally more appropriate when the government insists that its legislative program is fundamentally secular in design and effect, in the sense that religious considerations were not important in the motivation of the legislation, and that any religious effects of the law are purely incidental. Government cannot literally make that type of assertion when it grants exemptions, out of deference to religious convictions or status, from general secular laws.

The fundamental constitutional value that the *Schempp* test was designed to protect is "wholesome

neutrality" towards religion in the field of governmental activities and expenditures.[102] When government engages in affirmative programs for the general welfare, wholesome neutrality requires that the programs be truly secular in character. When, however, government seeks to accommodate its programs to the deeply held religious beliefs of part of its citizens, or when government refrains from the imposition of a tax burden on all religious organizations in order to minimize its involvement with religion and its interference with the free exercise of religion, its wholesome neutrality is achieved not so much by the "secular" character of the government's action as by the balance that the government strikes between secular and religious interests.

If, therefore, as *amicus* suggests, the *Schempp* test was not specifically designed by this Court to apply to the type of exemption at issue in this case, other constitutional criteria should be employed. These criteria unquestionably appear in the decisions of this Court that are directly concerned with religious exemptions from general secular laws. Applied here, those criteria fully sustain the constitutional permissibility of the New York type of tax exemption.

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[102] 374 U.S. at 222.

VII.

The New York Exemption is Fully in Accord With This Court's Decisions in the Area of Religious Exemptions From General Secular Laws

Religious exemptions have played an important role in the development of American Church-State policy. To be properly evaluated, they must be viewed within the context of the many facets of that policy at the Federal and State level. Taken in isolation, exemptions, perhaps, might seem to be an unconstitutional form of "aid"; taken in context, exemptions are clearly an important consitutional form of "accommodation."

In addition to permitting exemptions from property taxes for houses of worship but forbidding their direct support by tithes and taxes, American Church-State policy has guaranteed freedom of worship, preaching and education at the same time that it has prohibited European types of church establishment and any unnecessary governmental involvement with religious affairs. Accordingly, the American doctrine of separation of Church and State cannot be explained in a single sentence. Neither, despite the best efforts of some eminent constitutional scholars,[103] can the constitutionality of the manifold relationships between religion and government be determined by a single formula. The Constitution itself required two clauses to define the relationship

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[103]See, for example, Kurland, Religion and the Law (1962). For the difficulties in constructing a single test even for just one of the religion clauses, see Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 Yale L.J. 692 (1968).

between religion and government; it is unlikely that they can ever be reduced to one.

For these reasons, the constitutional permissibility of the universal practice of granting tax exemptions to houses of worship must not be viewed in isolation from the carefully articulated Church-State relationships of which this practice is only a part. For example, it is extremely significant that, with respect to houses of worship and other "exclusively religious" organizations, the States have uniformly followed a positive policy on *exemptions* and a negative policy on *grants*.

This careful and universal distinction between exemptions and grants strongly suggests that the States have seen a decisive constitutional difference between the effects of exemptions and the effects of grants with respect to houses of worship. These differences are both financial and political. On the financial side, exemptions do not pay the purchase price of land, the construction cost of churches or the salaries of ministers. Grants could. On the political side, there is no competition for exemptions—they are available to all religious groups (including those militantly opposed to traditional forms of organized and theistic religion) and to a wide variety of charitable and educational organizations.

On the other hand, grants to houses of worship, because of the limitations on the amount of money available, might tend to stimulate precisely the political competition that the First Amendment was designed to eliminate. Owing to their neutral financial and political effects, exemptions can be rightly viewed by the States as a fitting expression of "wholesome neutrality."

As Professor Freund has put it:

> "The traditional tax exemption of church-related property is sometimes advanced as a legal argument for subsidies, which are viewed as an economic equivalent. The argument, however, proves too much, since church buildings themselves are exempted, and it would hardly be argued that therefore subsidies for the building of churches would be valid. Moreover, the symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church. Psychologically, too, the the exemption differs from subsidy; the former is viewed as an entrenched status; the latter as a recurring political issue."[104]

If, contrary to our whole history, tax exemptions of houses of worship were part of a grant instead of a no-grant pattern at the State and Federal level, the constitutional question before this Court would be entirely different from what it actually is. The question would then be the extent of First and Fourteenth Amendment prohibitions on direct and purposeful financial support by government of churches precisely as churches—a question which this Court has already strongly answered in *Everson* and *Schempp*. Since, however, the State and Federal governments have joined a positive policy on exemptions of houses of worship with a negative policy on grants in that quarter, the constitutional question cannot be simply whether the exemp-

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[104] Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1687, n. 16 (1969).

tions aid the houses of worship, but must be whether the dual governmental policy on exemptions and grants conforms to the dual constitutional guarantee of free exercise and no establishment.

The complexity of American Church-State relationships is further illustrated by the fact that both Federal and State legislatures have constantly co-ordinated the tax treatment of religious organizations with that given to a wide variety of other types of nonprofit educational and charitable organizations.[105] In part, this co-ordination can be explained by the substantial engagement of the churches in charitable and educational activities. This explanation, however, may not be sufficient with respect to religious organizations that are exclusively concerned with religious worship. Legislatures have given the same tax treatment to sanctuaries as to scientific centers. It may be true that the constitutional justifications for this similarity of treatment may not be the same in both instances; it is certainly not true, however, that it is impossible for the constitutional justifications to be different. Proving that a house of worship stands in a different constitutional relationship to the government than a research center does not prove that the government is compelled to tax the sanctuary.

If, again contrary to our whole tradition, houses of worship were the only institutions given *ad valorem* tax exemptions, such unique tax treatment might raise an issue respecting an unconstitutional preference of religion. On the other hand, if houses of worship were the

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[105]Cf. the text of the current State statutes and constitutional provisions in Appendix B, found in the Supplement filed with this brief.

only voluntary, nonprofit institutions denied tax exemptions, there would be a very serious question of an unconstitutional discrimination against religion. The fact, however, is that the Federal and State governments have broadly structured the type of exemption at bar in this case, with the result that neither preference nor discrimination is at issue.

In approaching the permissibility of the New York type of exemption within the total framework of American tax and Church-State policies, the Court will find valuable guidance in its earlier decisions in *Jones v. Opelika,*[106] *Murdock v. Pennsylvania,*[107] and *Follett v. Town of McCormick.*[108]

In these three cases the Court confronted for the first time the problem of the relationship between the taxing power and the free exercise of religion. The Court's answer to the problem was unequivocal: government cannot tax a religious activity, even through the medium of a general, nondiscriminatory license tax on door-to-door selling of books, pamphlets and wares. The occupation of the colporteur, itinerant, or established in one community, was protected against the general peddler's tax, because the nature of the tax made it a prior restraint on the free exercise of religion. The Court also gave a second reason: the tax, if legitimate in principle, could spread in such a way as to make it financially impossible for religious sects like the Jehovah

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[106]316 U.S. 584 (1942), *reversed on rehearing* 319 U.S. 104 (1943).

[107]319 U.S. 105 (1943).

[108]321 U.S. 573 (1944).

Witnesses to carry on one of their fundamental religious activities. Mr. Justice Douglas made the point cogently for the Court in *Murdock v. Pennsylvania:* "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."[109]

Murdock, *Jones* and *Follett* stand squarely for the proposition that a religious exemption is *mandatory* where the occupational tax falls on the exercise of a religious activity and is of such a nature as to tend to make the continued exercise of the activity impossible. It can scarcely be doubted that this is sound constitutional doctrine today. If it is not, then the State and Federal governments would be free to tax preachers for giving sermons, priests for saying Mass, and rabbis for conducting Bar-Mitzvahs. The exemption from such taxes is *essential* for free exercise, because taxation is *incompatible* with free exercise. Just as the No Establishment Clause is a specific limitation on the taxing and spending power,[110] so is the Free Exercise Clause.

In deciding that Free Exercise guarantees had been breached in *Murdock, Jones* and *Follett,* the Court was careful not to give religious groups blanket constitutional protection against all financial burdens of government.[111]

The question whether the government *might* impose the general *ad valorem* taxes on property used or

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[109]319 U.S. at 111. Mr. Justice Douglas, of course, did not mean that government must *affirmatively* finance the free exercise of religion. The precise point was the necessity, in this case, of an *exemption.*

[110]Flast v. Cohen, 392 U.S. 83, 104 (1968).

[111]Cf. 319 U.S. at 112; 321 U.S. at 577-78.

employed in connection with religious activities was specifically distinguished from the question of license taxes. What, however, is extremely significant is that the majority of the Court never even raised the question of the constitutional permissibility of the traditional practice of exempting religious groups from general property taxes. Such permissibility seems to have been taken completely for granted.

Everson v. Board of Education[112] was decided three years after *Follett v. Town of McCormick*. The No Establishment language of *Everson* is clear and emphatic: government cannot tax to raise funds to support strictly religious activities. Yet there is not the slightest indication in the majority or minority opinions in *Everson* that members of the Court saw any inconsistency between what they said in *Everson* and what they had said so recently in *Murdock*, *Jones* and *Follett*. Indeed, the *Everson* majority cited *Murdock* as its authority for the incorporation of the religious guarantees of the First Amendment into the Fourteenth.[113]

One year after *Everson*, this Court invalidated a public school "on-the-premises" released-time program.[114] Five years after *Everson*, this Court sustained a different kind of released-time program, under which the public school accommodated its schedule to off-the-premises religious instruction.[115] The fundamental distinction between the

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[112] 330 U.S. 1 (1947).

[113] 330 U.S. at 8.

[114] *McCollum v. Board of Education*, 333 U.S. 203 (1948).

[115] *Zorach v. Clauson*, 343 U.S. 306 (1952).

two cases, however, did not rest on the use or non-use of public property. The essential difference between the two cases was the difference between an affirmative, purposeful support of religion as such by the government—a support that involved public premises, public officials and public embarrassment of the children of dissenters—and a deliberate abstention by the government in the interest of accommodating the free exercise of religion. The exemption from public school attendance which *Zorach v. Clauson* approved was constitutional because it did not frustrate the secular educational efficiency of the public schools, did not coerce anyone in the practice of his own religion, and did not involve the government intimately with religion. On the positive side, the exemption from public school attendance accommodated the constitutional right of parents to provide an efficient system of formal religious instruction for their children.

There is nothing, of course, in the language of *Zorach v. Clauson* to suggest that a state *must* grant the type of religious accommodation afforded by New York in that case. The attack was on the permissibility of the accommodation, and the Court answered in terms of permissibility. Thus, the Court recognized that the No Establishment and Free Exercise Clauses leave open at least one area of religious accommodation to legislative discretion.

The next important Church-State decisions by this Court were the *Sunday Closing Law Cases.*[116] Here a number of Jewish merchants claimed that they had a

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[116] 366 U.S. 420, 582, 599, 617 (1961).

constitutional right to an exemption. In disallowing that claim, on the ground that a mandatory exemption might frustrate the secular purpose of the Sunday closing laws, the majority of the Court clearly suggested that the States were free to grant the exemptions, if they were willing to assume the burden of doing so. One year later, the Court sustained precisely such an exemption.[117] By these decisions, the Court has recognized that the No Establishment and Free Exercise Clauses do not settle all matters on a constitutional level: the wall of separation has not destroyed the field of legislative discretion.

It is now necessary for this Court to decide once again[118] whether this discretionary area includes the traditional exemption of religious properties from the general *ad valorem* tax. *Amicus* has already urged the legislative and judicial history of these exemptions as compelling proof of their constitutional permissibility. That proof is solidly reinforced by a consideration of the consequences that a constitutional mandate of imposing taxation would inflict on the fiscal separation of Church and State and on the free exercise of religion.

A. *Fiscal Separation*. If the States are forced by the strictures of the Fourteenth Amendment to tax, rather than permitted by its guarantees to exempt, church property devoted exclusively to church purposes, the States will find that they are more substantially involved

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[117] *Arlan's Dept. Store v. Kentucky*, 371 U.S. 218 (1962).

[118] *Amicus* has already discussed earlier decisions by this Court on the merits in *Heisey v. County of Alameda*, 352 U.S. 921 (1956) and *General Finance Corp. v. Archetto*, 369 U.S. 423 (1962).

than at present with the churches. It must be noted that, whether the States tax or not, they must identify the churches as churches–most importantly, to avoid both establishment and interference with free exercise. Identification of the churches, however, brings governmental involvement with religion to an end in the area of taxation, provided that the States are permitted to exempt church property used for exclusively religious purposes. On the other hand, if the States are compelled to tax such property, there must be continuous governmental action aimed precisely at assessing the property and collecting the tax.

The difficulties involved in determining the secular value of property committed to a religious use are enormous. Religious property as such is scarcely the subject of ordinary commerce, and it seems both indecent and dangerous to force a cold appraisal of its secular value by the States. What is a sanctuary worth, as a sanctuary, on the open market? If governments are forced to tax, their involvement with the churches will reach an unprecedented level of intimate financial scrutiny.

Tax exemptions of houses of worship have undoubtedly played an important role in maintaining religious peace in the United States. By keeping the tax collector away from the sanctuary, they have prevented innumerable controversies over the secular value of objects men hold most sacred. Moreover, by preventing even the possibility of governmental foreclosures for deficient taxes on the places where men worship, exemptions have reinforced, not undermined, religious peace and the wall of separation between Church and State.

Some of the staunchest public defenders of the strict wall of separation have admitted that, in actuality, the exemption of church property "creates no relationship between Church and State."[119] It might be more accurate to say that it creates a relationship of minimal, healthy and neutral involvement. If State taxation becomes compulsory, the commendable goal of maintaining freedom of the churches from intimate governmental scrutiny will necessarily have been impaired. The good sense of not having the state undertake the role of tax collector and lien enforcer so far as church properties used for religious worship are concerned is obvious by inspection. We fail to see how abolition of the traditional practice of State exemption would further the constitutional ideal of separation of Church and State. Quite to the contrary, we believe it would be an unfortunate departure from that ideal, and a disservice to the States quite as much as to the churches.

B. *Free Exercise.* *Amicus* also believes it indisputable that, in the practical order of things, the compulsory elimination of tax exemptions for houses of worship might substantially impair the flourishing of religious liberty in the United States.

While all churches would be affected, it would be the smaller, rural country churches and the churches of the depressed center-city sectors of the large metropolitan areas that would be most hurt, if their dwindling, and frequently impecunious, congregations were required to pay taxes on church property. The assessed valuation might be substantial, if the norm of the best use to which the property might be put were employed. On the other hand, the ability of small rural and center-city

[119]Agnes E. Meyer, *The School, the State, and the Church,* Atlantic Monthly 45, 48 (Nov., 1948).

congregations to pay the taxes assessed on such a valuation would be extremely circumscribed.

Under a system of compulsory taxation, the larger churches would have a distinct financial advantage over the smaller ones. Compulsory taxation might force many small, independent churches to curtail their religious functions, merge with a denomination whose financial resources were more adequate than theirs, or even go out of existence. Thus, the religious pluralism that is characteristic of America and specially protected by the First Amendment would be substantially impaired should the New York type of exemption be forbidden by this Court.

C. *Burdens and Benefits.* Against the many arguments supporting the constitutionality of the New York type of exemption, there is one fundamental argument urged by those who seek the abolition of the exemption. This is the contention that the exemption forces them to pay more than they would otherwise have to pay in the way of taxes, and therefore to contribute to the support of the churches. *Amicus* has already pointed to the total lack of proof that appellant's taxes would in fact be reduced by the abolition of the New York exemption. There are, however, other compelling reasons for rejecting the argument based on the "burden" that exemptions allegedly impose on the nonchurchgoer, the nonbeliever, or the believer who does not believe in exemptions.

The first reason is that the "burden" falls equally on all taxable property owners, without distinction as to their religion or lack of it. Property taxes are not taxes *for the churches;* they are part of the basic revenue of the State needed to pay for its *general secular services to the entire community.* When appellant complains

that he does not receive his proportionate share of tax benefits because he does not belong to any church, he is in exactly the same position as other members of the community who object to this or that tax on the ground that they individually do not benefit from it at all or at least not as much as others.

The second fallacy in the "burden" argument is its complete misconception of constitutional rights to equality of tax treatment. Some Americans bear more of the cost of government than others, but there is no constitutional violation unless two persons in precisely the same economic and legal situation are treated differently by the government. When the legislature varies tax liabilities according to significant differences in economic and legal status, the legislature is distributing tax burdens in a constitutional and equitable manner. There is no constitutional mandate that every piece of property, or that every person and institution, be taxed. When the legislature grants the same tax exemption to houses of worship that it concedes to a wide variety of other private, voluntary, nonprofit organizations, the legislature may be "burdening" the appellant in common with all other taxpayers, but proof of a tax burden is no proof whatsoever of unconstitutionality.

Moreover, to look only at the burden is to miss the enormous benefit that such exemptions confer on American society. This is particularly true of religious exemptions from general secular laws. They greatly enhance religious liberty in a society as deeply pluralistic as our own. They express the deep-rooted and characteristic policy of not compelling conformity where conformity is not essential to the health, peace and prosperity of our country. To destroy religious exemptions in the name of preventing "burdens" on taxpayers (or "aid" to religion) would be to destroy the American

tradition of as much governmental accommodation as possible to the interests of religious liberty.

D. *Freedom of Conscience.* In addition to making the argument from financial "burden," appellant alleges that tax exemptions of houses of worship interfere with his freedom of conscience. This interference, however, amounts to nothing more than the State's adoption of a tax policy with which appellant disagrees in conscience. Appellant is not compelled to go to church or profess a creed. He is not compelled to pay any taxes levied for the support of religious worship. He has not been put under any civil disability or criminal penalty because of his religion. He is as free as any other American to worship in accordance with the dictates of his conscience.

From the very beginning, we have sought to accommodate our laws so that every citizen could live in as much harmony as possible with his conscience and his government. It is not possible, however, in a nation as religiously diverse as our own, to give every citizen's conscience a right of veto over governmental policy. Appellant is free to hold his conscientious convictions, but he has no right, merely because they are conscientious, to impose them as the law of the land.[120]

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[120]During the proceedings in the First Congress (1789) over the wording of the Bill of Rights to be submitted to the States, there were repeated efforts to add a "rights of conscience" clause to the No Establishment and Free Exercise guarantees. All such efforts, however, failed. See Antieau, Downey, and Roberts, Freedom from Federal Establishment 128-31 (1964). In view of this deliberate action by the First Congress, there is no historical basis for classifying mere disagreement in conscience as a constitutional injury.

In deciding where to draw the line between accommodation and non-accommodation of the individual conscience, our Nation has been guided by eminently practical, as well as constitutional, considerations of the degree of interference with essential secular objectives that accommodation involves, and of the degree of serious, personal hurt to the individual citizen that non-accommodation involves. On the basis of that distinction, it is manifest that tax exemptions of houses of worship do not paralyze the public revenue, and that taxation of such properties would involve the government very intimately with the churches and might well impose a significant burden on the religious liberty of many Americans. Thus, the importance of the accommodation far outweighs the financial burden, if any, on the government and on those who conscientiously disagree with the exemption policy.[121]

The tradition of tax exemptions which appellant requests the Court to strike down is a "rationally conceived and deep-seated policy, and not an accidental or

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[121] Cf. Chief Justice Warren's discussion of the constitutionality of indirect burdens on the free exercise of religion in *Braunfeld v. Brown*, 366 U.S. 599, 603-9 (1961), and especially the following passage: "Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference. . . . Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment." 366 U.S. at 606-7. What the Chief Justice said of economic disadvantages is even more applicable to conscientious disagreements with governmental policies.

vestigial survival of outmoded practices."[122] In part, it is a public policy which is deeply rooted in the attitude of the people toward religious liberty—an attitude which is as important today as it was when the Constitution, the Bill of Rights and the Fourteenth Amendment were adopted.

In a religiously pluralist nation like America, it is inevitable that the rationale of this public attitude toward tax exemption for church properties may differ somewhat from State to State and church to church. The national practice of permitting religious tax exemptions rests on a meld of both long-espoused philosophical and religious thought and widely held sociological convictions. The exemption of religious property is an undeniable and conspicuous aspect of the Nation's mores and constitutional structure.

Planted firmly in the Country's constitutional history, but at the same time transcending and illuminating that history, the venerable practice of permitting religious tax exemptions should be "in the highest degree persuasive, if not absolutely controlling,"[123] on the question of the proper construction of the religious guarantees of the First and Fourteenth Amendments.

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[122]Kauper, *The Constitutionality of Tax Exemptions for Religious Activities*, The Wall Between Church and State 95, 110 (Oaks Ed., 1963). Professor Kauper's article is by far the best modern treatment of the constitutionality of State property-tax exemptions of religious institutions.

[123]Cf. United States v. Graham, 110 U.S. 219, 221 (1884).

VIII.
Probable Practical Consequences If the Exemptions Were Prohibited

This Court recognized many years ago that "Taxation is eminently practical, and is in fact brought to every man's door, and . . . a tax should be regarded in its actual, practical results, rather than with reference to . . . theoretical or abstract ideas . . . ."[124] The taxation of houses of worship and other types of religious organizations would produce undesirable changes in the social order. The State, the Church, and society as a whole would each experience some significantly adverse impact. The wisdom of the long-standing legislative policy favoring religious exemptions is so great that this Court should not compel the abandonment of that policy on the basis of the wholly unconvincing Fourteenth Amendment contentions of the appellant.

A. *The Impact on the State.* If the States are held to be barred on constitutional grounds from permitting tax exemption of houses of worship, there will be no net financial gain, but perhaps a loss, to the State and there will ensue a substantial curtailment of valuable public benefit services conducted by the agencies of religious organizations, a slack which the State will have to take up itself.

Critics of the practice of tax exemption have often assigned financial reasons in urging that it cease.[125] In

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[124] *Nicol v. Ames*, 173 U.S. 509, 516 (1899).

[125] Paulsen, *supra* note 63, at 155-156. See also the brief *amicus curiae* offered in this case by Mrs. O'Hair and the Society of Separationists, at 28-33.

December 1875, President Grant, in his annual message to the Congress, previously referred to in this brief,[126] expressed his apprehension about the amount of "church property in the United States which paid no tax, municipal or State, . . ." President Grant told the Congress that tax exempt church property had reached the value of $1 billion in 1875.[127] Critics in more modern times continue to advance the same argument.[128] However, as one of those critics candidly conceded, it "is very difficult to make out a convincing factual case for eliminating religious tax exemptions . . . on the basis of the existing data."[129]

So far as New York is concerned, studies conducted over the years beginning in 1920 through 1966 show that the total value of all private exempt property is not large proportionally to the total assessed valuation of all real estate. Secondly, the proportion of all exempt property represented by church-owned property is an extremely modest fraction of total exempt property of all sort. Finally, if one were able to break down the religious property used exclusively for places of worship, as opposed to other property owned by religious organizations, the net total of that property obviously would be less than the total assigned for religious-owned exempt

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[126] *Supra*, p. 42.

[127] 4 Cong. Rec. 175 (1875).

[128] Stimson, *The Exemption of Churches From Taxation*, 18 Taxes 361, 364 (1940); Blake, *Tax Exemption and the Church*, Christianity Today 7 (August 3, 1959).

[129] Paulsen, *supra* note 63, at 156.

property. Set out in the footnotes is a summary of the tax studies referred to and the statistical evidence drawn from them.[130] Of special interest may be a 1967 report on real estate tax exemptions in New York City which indicates that, out of a total of tax exempt property in New York City exceeding $15 billion, a little less than $700 million, or 4.9% of that total, represented religious property.[131] The studies cited in the footnotes

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[130]In 1920 the assessed valuation of real property subject to taxation in New York was $14,596,000,000, while the value of *all* tax-exempt realty was $2,997,000,000. The percentage ratio of tax-exempt real property to all assessed property was 20.5%. Special Joint Committee On Taxation and Retrenchment, Tax Exemption In State of New York 37 (1927). In 1930, this percentage ratio was 22.9%. Bailey, Tax Exemption In New York 15 (1932). In that year a special committee concluded that contrary "to the general impression exemptions to religious and charitable institutions do not bulk large in the aggregate factors." Report of the New York State Commission For the Revision of the Tax Laws 121 (1932). In 1932, the total value of *all* tax exempt property was $6,367,000,000. Of this total, however, 78% represented exemptions for governmentally owned property, Federal, State, county and local. The figure for religious property exemptions in 1932 was $609,000,000, or 9.54% of the total of all tax exempt property in New York. Tobin, Hannan and Tolman, The Exemption From Taxation of Privately Owned Real Property Used For Religious, Charitable and Educational Purposes In New York State 42 (1934). In 1959, the great bulk of tax exempt property in New York (78%) continued to be publicly owned property, In that year, only 6.3% of the property exempted from taxes represented property owned by religious institutions. State of New York, Temporary Committee On the Revision and Simplification of the Constitution, Staff Report on Tax Exemptions (No. 28) 3 (1959).

[131]Real Estate Tax Exemption In New York City—A Design For Reform, Citizens Budget Commission (1967). In 1966, the total of all exempt private property in New York City was $2,743,660,916, of which $698,339,020 was religious held prop-

rather persuasively support Dean Paulsen's conclusion that it is very difficult to make out a case for the proposition than an elimination of the tax exemptions for all property owned by religious organizations, including, for example, hospitals and schools, as well as churches (much less elimination of the much smaller amount of property used exclusively for religious worship) would provide a net financial gain to the State.[132]

The elimination of tax exemption for religious property would produce a substantial curtailment in the social welfare services carried on by the churches and their affiliated agencies, services, the performance of which would then have to be taken up by the State.[133] Thus in the long run, elimination of the exemption might well bring about an increase, not a decrease, in the tax burden of its citizens. In summary, the financial consequences to the States, should exemptions of the type at issue here be eliminated, would be a *de minimis* gain at best and a net loss in revenue at worst. The critics who oppose exemptions for church owned prop-

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erty. *Id.* at 26. In 1966, tax exemptions afforded public bodies, including the United States, the United Nations, the State of New York, the City of New York, public housing and other public authorities, exceeded $12,500,000,000. *Id.* at 37, 40, 44, 46, 53 and 56. Exemptions for federally aided housing alone in New York City, for example, exceeded the religious property exempted by $13 million. *Id.* at 56.

[132]Paulsen, *supra* note 63, at 156. On the local level, a New York committee concluded that "there is no relation between the amount of tax exempt property in a given city or town and the cost of government or the local tax rate. . . ." Special Joint Committee, *supra* note 130, at 13, 49.

[133]Tolman, *Tax Exemption In New York State*, The Tax Magazine 1 (June 1935).

erty on alleged financial grounds take their stand on an unproven and unconvincing ground.

Financial considerations aside, there can be little doubt that additional burdens would be thrown upon the State, if, as a result of the elimination of tax exemptions, the churches and their affiliated institutions were forced to reduce the public benefit activities which they now conduct. Religious organizations make vast contributions to the general welfare of the communities in which they are located. We have previously provided some indication of the scope of those activities conducted by agencies of the Catholic Church in America.[134] Most of the churches perform similar services throughout the communities of the Country. Wholly apart from the spiritual uplift and moral inspiration which churches attempt to engender, they underwrite and perform a very substantial part of the charity and social welfare efforts conducted in the private sector of society. As the Maryland Court of Appeals recently said:

> "It is not disputed that today religious organizations, as a major part of their functions, carry on activities secular in nature, of substantial benefit to the community, such as aid to the poor and aged, day nurseries, care of the sick and efforts to eliminate racial inequalities. Programs such as these serve public needs; the performance of these functions by private agencies saves the State the expense of providing the same services."[135]

The Maryland Court of Appeals also recognized another aspect of the presence of churches in a community

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[134] *Supra*, pp. 3-4.

[135] *Murray v. Comptroller of the Treasury*, 241 Md. 383, 401 216 A.2d 897, 907 (1966), *cert. den.* 385 U.S. 816 (1966).

that has relevance in assessing tax and revenue consequences of exemptions for churches, when it noted that their existence and the activities they carry on help "attract persons to communities and . . . tend to increase the general tax assessment base."[136]

Such reliable statistics as are available portray concretely the material value of the great variety and extensive scope of the general welfare activities conducted by the churches of this Country. We believe the proposition self evident that, if church tax exemptions are eliminated, one of the immediate consequences to the State will be additional burdens thrust upon it, in terms of both money and effort, to assume the performance of public welfare responsibilities which the churches will have been forced to cut back.

The probability of significant adverse consequences to the States, should they be denied the right to exempt church property from taxation, itself furnishes a persuasive ground for leaving the granting or denial of such exemptions to the discretion of the States. "The exemption of property from taxation is a question of policy and not of power."[137] And, while "the line between the taxable and the immune [often] has been drawn by an unsteady hand,"[138] it cannot be fairly maintained that the exemptions challenged in this litigation have no reasonable relationship to the achievement and protection of legitimate secular concerns of the State.

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[136] 241 Md. at 402, 216 A.2d at 908.

[137] *State of Ohio v. Knopp*, 57 U.S. 369, 384 (1853).

[138] *United States v. Allegheny Co.*, 322 U.S. 174, 176 (1944).

B. *The Adverse Effect on the Churches.* The curtailment of social welfare services that would result from the imposition of taxes would be a loss not only to the State, but to the churches as well. To the extent that a church must reduce the scope and tempo of its good works, it is *pro tanto* less a "religious" organization than it was before. This is all the more true today, when the churches are more intensely concerned with the social problems of our Country than they have ever been in the past.

It is self-evident that, if the church properties must be taxed, there will have to be some retrenchment in activities conducted by the churches in order to bear the increased economic burden thus thrust upon them. Like charitable institutions which also are beneficiaries of tax exemption, church organizations perform many services identical with those carried on by such institutions, such as the maintenance of old people's homes, schools, orphanages, hospitals, and related public welfare services.[139] Could it be seriously argued that charitable corporations would not have to restrict the scope of their activities if they were made subject to tax? So, too, if church property is required to be taxed rather than being permitted exemption from taxation, it will be unavoidable that the churches will have to effect a reduction in the types and quantity of public welfare services previously undertaken by them for the benefit of the community as a whole. What that reduction would amount to in particular cases would depend on the

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[139] For a detailed account of the activities of churches in a typical American community, see Douglas, The Springfield Church Survey (1926); Paulsen, *supra* note 63, at 151.

financial resources of the church concerned and the community involved. In New York City, for example, it has been estimated that, if the tax exemption on church property were eliminated, churches there would have to pay approximately $35 million in taxes to the City.[140] Could such an increased financial burden be met by the churches of that city without substantial decreases in their operating costs?

C. *The Structure of American Society Would Suffer.* The social structure of our country is complex. At its base stand the American people. These people have created our Federal and State governments, organized our churches, and generated a wide variety of other private, nonprofit voluntary institutions. Tax exemptions have played an important role in keeping this complex societal structure in balance. Any repudiation by this Court of the oldest, most deliberate and most cherished tax exemption in the United States would inevitably disturb and weaken the structure of American society. Such disturbance could not possibly be justified except on the basis of compelling constitutional reasons—reasons that manifestly do not exist in this case.

CONCLUSION

For the reasons stated in its brief, this *amicus* urges that the Court either affirm the decision of the Court of Appeals of New York or vacate its order of June 16, 1969 noting probable jurisdiction in this case and

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[140] Real Estate Tax Exemption In New York City—A Design For Reform, *supra* note 131, at 11; Morgan, The Politics of Religious Conflict 42 (1968).

grant appellee's motion to dismiss the appeal for want of a properly presented federal question.

Respectfully submitted,

WILLIAM R. CONSEDINE
GEORGE E. REED
VINCENT C. ALLRED
1312 Massachusetts Avenue, N.W.
Washington, D. C.

ALFRED L. SCANLAN
734 Fifteenth Street, N.W.
Washington, D. C.

ARTHUR E. SUTHERLAND
Cambridge, Massachusetts

FRANCIS X. GALLAGHER
JOSEPH G. FINNERTY, JR.
Baltimore, Maryland

CHARLES M. WHELAN
Fordham Law School
New York, New York

Attorneys for United States Catholic Conference
Amicus Curiae

Of Counsel:

SHEA & GARDNER
Washington, D. C.

October 17, 1969

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 135

FREDERICK WALZ, *Appellant*,

v.

TAX COMMISSION OF THE CITY OF NEW YORK, *Appellee*.

Appeal from the Court of Appeals
of the State of New York

SUPPLEMENT CONTAINING APPENDICES TO BRIEF OF UNITED STATES CATHOLIC CONFERENCE, AMICUS CURIAE

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APPENDIX A

EARLIEST STATE TAX EXEMPTION STATUTES OF THE ORIGINAL 13 STATES AND THE DISTRICT OF COLUMBIA

Delaware	–Statute of 1796	South Carolina	–Statute of 1813
Maryland	–Statute of 1798	Rhode Island	–Statute of 1822
New York	–Statute of 1799	Connecticut	–Statute of 1822
Pennsylvania	–Statute of 1799	Georgia	–Statute of 1833
Virginia	–Statute of 1800	Massachusetts	–Statute of 1835
District of Columbia	–Statute of 1802	New Hampshire	–Statute of 1853
North Carolina	–Statute of 1806	New Jersey	–Statute of 1866

RELEVANT TEXT

CONNECTICUT

"That * * * buildings occupied as colleges, academies, school houses, churches and infirmaries shall be * * * exempted from taxation * * *". Chapter 29, Public Acts of Connecticut, 1822.

DELAWARE

Statute provides for exemption from taxation of "real or personal property * * * belonging to * * * any church, county, religious society or parish, or to any college, or to any county school, or to any corporation for charitable uses * * *". Statute enacted February 9, 1796, codified as Section 1, Chapter XCVIII, Vol. 2, Laws of the State of Delaware, 1700-1797, page 1247.

GEORGIA

"From and after the passage of this act, the lots or parcels or land on which the churches of the different denominations of this state and the burying grounds attached thereto are situated, shall not be subject to

taxation * * *". Act of December 23, 1833, codified Digest of the Laws of Georgia, 1837, page 865, also cited in Analysis of the Statutes of Georgia, 1846, page 672.

MARYLAND

"An Act for the valuation of real and personal property within this State". "Section 1. Be it enacted by the General Assembly, That all real and personal property in this state, except property belonging to this state, or the United States, houses for public worship, burying grounds, or property belonging to any county, or to any college, or to any county school * * * shall be valued agreeably to the directions of this act, and shall be chargeable to such valuation * * *". Act of January 20, 1798, codified Maryland Laws by Kilty, 1785-1799, Chapter LXXXIX.

MASSACHUSETTS

"The following property and polls shall be exempted from taxation, namely:

* * *

"Fifthly, all houses of religious worship and the pews and furniture within the same * * *". Massachusetts Revised Statutes of 1835, Title III, Section 5, page 75:

NEW HAMPSHIRE

"All real estate except houses of public worship, school houses, seminaries of learning and property of the State * * * is liable to taxation * * *". Section 2, Title VIII, New Hampshire Compiled Statutes, 1853, page 113.

NEW JERSEY

New Jersey statute provides for exemption of: "All colleges, academies or seminaries of learning, public

libraries, school houses, buildings erected and used for religious worship, and the land whereon the same are situated necessary for the fair use and enjoyment thereof not exceeding five acres for each one, the furniture and the personal property used therein". Act of April 11, 1866, Session Laws of 1866, pages 1078-1079.

However, it was indicated that in actual practice, taxes were not levied on church property in times preceding enactment of the foregoing statute. *State v. Jesse Platte, Collector of Jersey City,* 24 N.J.L. 108 (1856).

NEW YORK

"No * * * church or place of public worship * * * nor any college or incorporated academy, nor any school house shall be taxed * * *". Act of 1 April 1799, codified as Chapter 72, New York Laws, 1797-1800, Vol. 4, page 414.

Act of April 23, 1823, page 391, Laws of 1823, provided that no tax be levied on "any college or incorporated academy, nor any building for public worship * * *".

NORTH CAROLINA

"That from and after the passing of this act all houses and lots, or other estate, real or personal appertaining thereto, set apart and appropriated to divine worship or for the education of youth, shall be, and the same are hereby exempted from all taxes whatsoever, any laws to the contrary notwithstanding". Section X, Chapter III, Laws of North Carolina, 1806, being a provision in an "Act to Raise Revenue", codi-

fied in North Carolina Revised Laws, 1796-1820, by Potter, Taylor and Young.

PENNSYLVANIA

Pennsylvania statute requires tax assessors "to take account of all the names and surnames in alphabetical order * * * of all taxable inhabitants * * * ministers of the gospel and school masters only exempted * * *". Section VIII, Chapter 1095, Pennsylvania Statutes at Large, 1798-1801, passed April 11, 1799, page 379.

Statute provides: "That from and after the first day of May, next, all churches, meeting houses or other regular places of stated religious worship * * * all burial grounds belonging to any religious congregation, all universities, colleges, academies and school houses, * * * be and the same are hereby exempted from all and every county, road, city, borough, poor and school tax * * *". Act of 16 April 1838, codified page 769, Pennsylvania Laws, 1700-1852, and also in Laws of Pennsylvania, 1700-1849, page 854.

RHODE ISLAND

Rhode Island statute provides: "All estate, real and personal granted or appropriated to religious uses, or to the use of schools or seminaries of learning within this state, be and the same hereby are exempted from taxation". Rhode Island Public Laws, 1822, page 318, section 27, of an Act Regulating the Assessing and Collecting of Taxes.

SOUTH CAROLINA

South Carolina statute exempts from taxation "lands whereon any churches or other buildings for divine worship or free schools are erected". Statute of March

22, 1786. Codified, South Carolina Statutes at Large, 1752-1786, page 732.

Statute provides that: ". . . nothing in this Act contained shall be construed to impose any tax upon property or estate of any religious society". Act of December 18, 1813, South Carolina Statutes, 1786-1814, page 704.

"Provided, that no taxes shall be collected on lands, lots, houses, or other property belonging to this Commonwealth, or to any county, town, college, houses for divine worship, or seminary of learning". Act of January 23, 1800, Virginia Statutes at Large, Shepherd's Continuation of Henning, 1796-1803, page 200.

DISTRICT OF COLUMBIA

"An Act to lay and collect a direct tax", enacted by the City Council of Washington, October 6, 1802.

"Be it enacted by the First and Second Chambers of the City Council of the City of Washington, That, on all real and personal property within the City of Washington, there shall be laid a tax of twenty five cents on every hundred dollars worth of the same, except property belonging to the United States, houses for public worship, burying grounds, or property belonging to any college or school * * *". Page 20, Bothwell's Compilation of Laws for Washington (1833); see also, Acts of the Corporation, 1803, Chapter V, page 13.

APPENDIX B

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS EXEMPTING RELIGIOUS PROPERTY FROM TAXATION

Note: This appendix contains the current constitutional and statutory provisions in each State. Where the current constitutional provision differs from the first constitutional provision in the State, the text of the first provision is also given, usually from THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS (7 vols.; 1909). Where possible, except for New York, only those constitutional and statutory provisions directly relating to religious property exemptions have been excerpted. All passages are exact quotations.

CONSTITUTION	ALABAMA	STATUTE

The legislature shall not tax the property, real or personal, of the State, counties, or other municipal corporations, or cemeteries; nor lots in incorporated cities or towns, or within one mile of any city or town to the extent of one acre; nor lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when same are used exclusively for religious worship, for schools, or for purposes purely charitable. Art. IV, sec. 91 (1901).

First provision:
The property of private corporations, associations and individuals shall be taxed for the purposes of the State, subject to such exemptions as may be provided by law. Art. XI, sec. 1 (1875).

Persons and property—The following property and persons shall be exempt from ad valorem taxation and none other: (a) All bonds of the United States and this State, and all county and municipal bonds issued by counties and municipalities in this State, all property, real and personal, of the United States and this State, and of county and municipal corporations in this state; all cemeteries; all property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable; provided, however, property real or personal owned by any educational,

CONSTITUTION	STATUTE
viduals of this State shall forever be taxed at the same rate; Provided, this section shall not apply to institutions or enterprises devoted exclusively to religious, educational or charitable purposes. Art. X, sec. VI (1875); 1 THORPE 174-75.	religious or charitable institutions, society or corporation, let for rent or hire or for use for business purposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for education, religious or charitable purposes. Ala. Code, Tit. 51, sec. 2.
ALASKA	
All or any portion of property used exclusively for nonprofit religious, charitable, cemetery, or educational purposes as defined by law, shall be exempt from taxation. Other exemptions of like or different kind may be granted by general law. All valid existing exemptions shall be retained until otherwise provided by law. Art. IX, sec. 4 (1956).	(B) . . . all property used exclusively for religious, educational, charitable purposes . . . are exempt from taxation. (c) The term "property used for religious purposes" includes the residence of the pastor, priest, or minister of a religious organization, and other property of the organization not used for business, rent or profit. (d) . . . if a religious . . . organization derives rentals or profits from its property, that property is not exempt. Alaska Gen. Prop. Tax Stat., sec. 29.10.336.

ARIZONA

CONSTITUTION	STATUTE
There shall be exempt from taxation all federal, state, county and municipal property. Property of educational, charitable and religious associations or institutions not used or held for profit may be exempt from taxation by law. Art. IX, sec. 2 (1912). *First provision:* Exempted "all property of religious associations or institutions not used or held for profit." Art. X, sec. 2 (1910).	All property in this State shall be subject to taxation, except: 6. Hospitals, asylums, poor houses and other charitable institutions for the relief of the indigent or afflicted, and the lands thereto appurtenant, with their fixtures and equipment, not used or held for profit. . . . Churches and other buildings used for religious worship with their furniture and equipment and the land and improvements appurtenant thereto and used therewith, provided rent is not paid for such land or improvements and so long as the property shall not be used or held for profit; cemeteries and graveyards set apart and used for interring the dead, except such portions thereof as are used or held for profit. Ariz. Rev. Stat. Ann., ch. 2, sec. 42-271.

ARKANSAS

The following property shall be exempted from taxation: public property used exclusively for public purposes; churches used as such, cemeteries used exclusively as such; school buildings and apparatus; library and grounds used exclusively for school purposes and buildings and grounds and materials used exclusively for	All property described in this section to the extent herein limited shall be exempt from taxation: FIRST, All public school houses and houses used exclusively for public worship and the grounds attached to such buildings necessary for the proper occupance, use and enjoyment of the same and not leased or

CONSTITUTION	STATUTE
public charity. Art. XVI, sec. 5 (1874). *First provision:* ... but burying grounds, public schoolhouses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, shall never be taxed. Art. X, sec. 2 (1868); 1 THORPE 323.	otherwise used with the view to profit. Ark. Stat. Ann., sec. 84-206 (1947).

CALIFORNIA

Exemption of church property; church buildings under construction; parking lots. All buildings and equipment and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship, and any building and its equipment in the course of erection, together with the land on which it is located as may be required for the convenient use and occupation of the building, if such building, equipment and land are intended to be used solely and exclusively for religious worship. Art. XIII, sec. 1½ (1879).	Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if: 1) The owner is not organized or operated for profit; ... Cal. Stat. Ann., Rev. and Tax Code, sec. 214.

CONSTITUTION	COLORADO	STATUTE
Property used for religious worship, schools and charitable purposes, Exempt.—Property, real and personal, that is used solely and exclusively for religious worship, for schools or for strictly charitable purposes, also cemeteries not used or held for private or corporate profit, shall be exempt from taxation, unless otherwise provided by general law. Art. X, sec. 5 (1876).		The following shall be exempt from general taxation under the provisions of this chapter: (6) Property, real and personal, that is owned and used exclusively for religious worship, and not for private or corporate profit. The exemption contemplated in this restriction shall be limited to any building or edifice and the personal property located therein which is primarily used for religious worship and any land which is essential to the functioning of said edifices, or to meet zoning standards and building requirements, or provide parking space for such building or edifice, together with convents for religious women of all denominations, houses used solely for ecclesiastical administration by laymen and women of all denominations, commonly known as retreat houses. Colo. Rev. Stat., sec. 137-2-1, as amended by ch. 449, Laws of 1967.

CONNECTICUT	
[NONE]	The following described property shall be exempt from taxation: (13) . . . houses of religious worship, the land on which they stand, their pews, furni-

CONSTITUTION	STATUTE
	ture and equipment owned by or held in trust for, the use of any Connecticut religious organization. (14) . . . real property and its equipment owned by, or held in trust for, any religious organization and exclusively used as a school, a parish house, an orphan asylum, a home for children, a reformatory or an infirmary or for two or more of such purposes. (15) . . . dwelling houses and the land on which they stand owned by, or held in trust for, any religious organization and actually used by its officiating clergyman. Conn. Gen. Stat. Ann., sec. 12-81.
DELAWARE	
All taxes shall be uniform upon the same class of subject within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, but the General Assembly may, by general laws, exempt from taxation such property as in the opinion of the General Assembly will best promote public welfare. Art. VIII, sec. 1 (1897).	All real and personal property belonging to this State, or the United States, or any County of this State, or any church or religious society and not held by way of investment, or any college or school and used for educational or school purposes, or any corporation created for charitable purposes and not held by way of investment, except as otherwise provided, shall not be liable to taxation and assessment for public purposes by any county or other political subdivision of the State. Del. Code Ann., sec. 8103.

CONSTITUTION	FLORIDA	STATUTE
Uniform and equal rate of taxation: special rates.—The legislature shall provide for a uniform and equal rate of taxation . . . and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such property as may be exempted by law for municipal, education, literary, scientific, religious or charitable purposes. Art. IX, sec. 1 (1885). *First provision:* The legislature shall provide for a uniform and equal rate of taxation, and shall prescribe such regulations as shall secure a just valuation of all property both real and personal, excepting such property as may be exempt by law for municipal, educational, literary, scientific, religious or charitable purposes. Art. XIII, sec. 1 (1868); 2 THORPE 718.		The following property shall be exempt from taxation: (4) All houses of public worship and lots on which they are situated, and all pews or steps and furniture therein, every parsonage and all burying grounds not owned or held by individuals or corporations for speculative purposes, tombs and rights of burial; but any building being a house of worship which shall be rented or hired for any other purpose except for schools or places of worship, shall be taxed the same as any other property. Fla. Stat. Ann., sec. 192.06.

GEORGIA

Exemptions from taxation. The General Assembly may, by law, exempt from taxation all public property; places of religious worship or burial; all institutions of purely public charity; all intangible personal property owned by or irrevocably held in trust for the		The following property shall be exempt from taxation, to wit: All public property; places of religious worship or burial; . . . all institutions of purely public charity; hospitals not operated for the purpose of private or corporate profit and income, . . . all buildings

CONSTITUTION	STATUTE
exclusive benefit of, religious, educational and charitable institutions, no part of the net profit from the operation of which can inure to the benefit of any private person; all buildings erected for and used as a college, incorporated academy or other seminary of learning, and also all funds or property held or used as endowment by such colleges, incorporated academies or seminaries of learning, provided the same is not invested in real estate; and provided further, that said exemptions shall only apply to such colleges, incorporated academies or other seminaries of learning as are open to the general public. Art. VII, sec. 2-5404, para. IV (1945).	erected for and used as a college, non-profit hospital, incorporated academy or other seminary of learning, and also all funds or property held or used as endowment by such colleges and seminaries of learning, provided the same is not invested in real estate . . . and provided further that said exemptions shall only apply to such colleges, non-profit hospitals, incorporated academies or other seminaries of learning as are open to the general public. Ga. Code Ann., sec. 92-201.
First provision: The General Assembly may, by law, exempt from taxation, all public property, places of religious worship or burial; all institutions of purely public charity; all buildings erected for and used as a college, incorporated academy, or other seminary of learning; the real and personal estate of any public library, and that of any other literary association, used by or connected with such library; all books and philosophical apparatus; and all paintings and statuary of any company or association, kept	

CONSTITUTION	STATUTE
in a public hall and not held as merchandise, or for purpose of sale or gain: Provided, the property so exempted be not used for purposes of private or corporate profit or income. Art. VII, sec. 2 (1877); 2 THORPE 864.	
HAWAII	
[NONE]	Charitable, etc., purposes. (a) These shall be exempt from real property taxes . . . (3) Property used for church purposes, including incidental activities, parsonages and church grounds, the property exempt from taxation being limited to realty, exclusive of burial grounds (exempt under Paragraph 4). Hawaii Rev. Stat., sec. 246-32.
IDAHO	
Taxes to be uniform: Exemptions. All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal: *Provided,* That the legislature may allow such exemptions from taxation from time to time as shall seem necessary	The following property is exempt from taxation: B. Property belonging to any religious corporation or society of this state and used exclusively for and in connection with public worship, and any parsonage belonging to such corporation or society and occupied as such, and any recreational hall belonging to and used in connection with the activities of such corporation or society.

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and just, and all existing exemptions provided by the laws of the territory, shall continue until changed by the legislature of the state; *Provided further:* That duplicate taxation of property for the same purpose during the same year, is hereby prohibited. Art. VII, sec. 5 (1889).

STATUTE

K. Hospitals and refugee homes . . . .

L. All property used exclusively by the owner for school or educational purposes, from which no profit is derived . . . .

M. All public cemeteries. Idaho Code, sec. 63-105.

ILLINOIS

The property of the State, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law. Art. IX, sec. 3 (1870).

First provision:
The property of the State and counties, both real and personal, and such other property as the general assembly may deem necessary for school, religious and charitable purposes, may be exempted from taxation. Art. IX, sec. 3 (1848); 2 THORPE 1004.

All property described in this section to the extent herein limited shall be exempt from taxation, that is to say:

(2) All property used exclusively for religious purposes or used exclusively for school and religious purposes or for orphanages and not leased or otherwise used with a view to profit.

(3) All lands used exclusively as graveyards or grounds for burying the dead.

(7) All property of institutions of public charity, all property of beneficent and charitable organizations, whether incorporated in this or any other state of the United States, and all property of old peoples homes when such property is actually and exclusively used for such charitable or beneficent purposes, and not leased or otherwise used with a view

CONSTITUTION	STATUTE
	to profit; and all free public libraries. Smith Hurd Ill. Stat., ch. 120, sec. 500.

INDIANA

The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal. The General Assembly may exempt from property taxation any property in any of the following classes: (1) Property being used for municipal, educational literary, scientific, religious or charitable purposes. Art. X, sec. 1 (1851).	The following property shall be exempt from taxation: Fifth: Every Building, or part thereof, used and set apart for educational, literary, scientific, religious or charitable purposes by any institution, or by any individual, or individuals, associations or incorporation, provided that same is owned and actually occupied by the institution, individual, association or incorporation using it for such purpose or purposes . . . and the tract of land on which such building is situate, including the campus and athletic grounds of any educational institution, not exceeding fifty (50) acres; also the lands purchased with the bona fide intention of erecting buildings for such uses thereon, not exceeding forty (40) acres; also the personal property, endowment funds and interest thereon belonging to such institution . . . used or set apart for the purpose aforesaid. Burns Ind. Stat., sec. 64-201, as amended by ch. 347, Laws of 1967.

CONSTITUTION	IOWA	STATUTE
General Assembly shall encourage by all suitable means intellectual, moral scientific . . . pursuits. Art. IX, sec. 3 (1857).		The following classes of property shall not be taxed: 9. *Property of religious, literary, and charitable societies.* All grounds and buildings used or under construction by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used or under construction with a view to pecuniary profit. Idaho Code Ann., sec. 427.1.
	KANSAS	
* * * All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars for each family shall be exempt from taxation. Art. XI, sec. 1 (1959).		*Property exempt; exceptions.* That the property described in this section, to the extent herein limited, shall be exempt from taxation: First. All buildings used exclusively as places of public worship, as public schoolhouses or both, with the furniture and books therein contained and used exclusively for the accommodation of schools the religious meetings, together with the grounds owned thereby, not exceeding in any one case ten (10) acres, if not leased or otherwise used with a view to profit; and also any parsonage or dwelling owned by any church society . . . . Kan. Stat. Ann., sec. 79-201.

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KENTUCKY	
There shall be exempt from taxation public property used for public purposes; places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain. Sec. 170 (1890).	[NONE]
LOUISIANA	
Section 4 (As amended by Act 68 of 1936). The following property and no other, shall be exempt from taxation: 1. All public property. 2. Places of religious worship, rectories and parsonages belonging to religious denominations and used as places of residence for ministers; places of burial; places devoted to charitable undertakings; . . . . Art. X, sec. 4 (1929).	[NONE]

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First provision: The general assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes. Art. 124 (1864); 3 THORPE 1443.	
MAINE	
[NONE]	The following property of institutions and organizations is exempt from taxation: Houses of religious worship, including vestries, and the pews and furniture within the same; tombs and rights of burial; and property owned and used by a religious society as a parsonage to the value of $20,000, and personal property not exceeding $6,000 in value, but so much of any parsonage as is rented is liable to taxation. Me. Rev. Stat. Ann., tit. 36, sec. 652(1)(G).
MARYLAND	
[NONE]	The following shall be exempt from assessment and from State, County, and City taxation in this State, each and all of which exemptions shall be strictly construed: (4) Church, parsonages, etc.—Houses and buildings used exclusively for public worship, and the furniture contained

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	therein, and any parsonage used in connection therewith, and the grounds appurtenant to such houses, buildings and parsonages and necessary for the respective uses thereof. Md. Code Ann., art. 81, sec. 9.
	NOTE: Original exempting statute, Act of January 20, 1798, reprinted in Maryland Laws by Kilty, 1785-1799, provided as follows: "Be it enacted by the General Assembly of Maryland, that all real and personal property in this state, except property belonging to this state, or the United States, houses for public worship, burying grounds, or property belonging to any county or to any college, or to any county school . . . shall be valued agreeably to the directions of this Act, and shall be chargeable according to such valuation with the public assessment."
MASSACHUSETTS	
	Chapter 59, § 5, Massachusetts Code of Laws Annotated:
[NONE]	The following property shall be exempt from taxation:
	Eleventh, Houses of religious worship owned by, or held in trust for the use of any religious organization, and the pews or furniture, ... Mass. Gen. Laws Ann., ch. 59, sec. 5.

CONSTITUTION **MICHIGAN** STATUTE

Exemption of religious or educational nonprofit organizations.

Sec. 4. Property owned and occupied by nonprofit religious or educational organizations and used exclusively for religious or educational purposes, as defined by law, shall be exempt from real and personal property taxes. Art. IX, sec. 4 (1963).

Note in Michigan Code:
Convention Comment–This is a new section providing exemption from property taxes of those properties owned and occupied by non-profit corporations and used exclusively for religious or educational purposes. These exemptions already exist by statute.

The following property shall be exempt from taxation:

Fifth, All houses of public worship, with the land on they stand, the furniture therein and all rights in the pews, and also any parsonage owned by any religious society of this state and occupied as such; . . . . Mich. Comp. Laws Ann., sec. 211.7.

MINNESOTA

. . . public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, shall be exempt from taxation, ... Art. IX, sec. 1; Constitution of 1857.

All property described in this section to the extent herein limited shall be exempt from taxation:

(5) All churches, church property, and houses of worship;

(Seven exemptions, including above, were embodied in Rev. Laws, sec. 795 [1905].) Minn. Stat. Ann., sec. 272.02; 317.66 Subd.3. Property exempt from taxation.

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	Except for property leased or used for profit, all personal and real property that a religious corporation necessarily uses for a religious purpose is exempt from taxation. (Laws 1951, c. 550, § 66.) Minn. Stat. Ann., sec. 317.66, Subd. 3.

MISSISSIPPI

[NONE]	The following shall be exempt from taxation: (a) All cemeteries used exclusively for burial purposes. (d) All property, real or personal, belonging to any religious society or ecclesiastical body and/or any congregation thereof, or to any charitable society .... Miss. Code 1942, and/or patriotic association or society.... Miss. Code 1942, sec. 9697 (Supp. 1950).

MISSOURI

Exemptions from taxation. All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for	The following subjects shall be exempt from taxation for state, county or local purposes .... (5) all property, real and personal, actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit ...

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purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article shall be void. Art. X, sec. 6 (1945).	except that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment, even though the income or rentals received therefrom be used wholly for religious, educational or charitable purposes. Mo. Stat. Ann., sec. 137, 100.
First provision: Sec. 6. * * * Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; . . . . Art. X, sec. 6 (1875); 4 THORPE 2249.	

MONTANA

. . . such other property as may be used exclusively for the . . . educational purposes, places for actual religious worship, hospitals and places of burial not used or held for private or corporate profit, institutions of purely public charity . . . may be exempt from taxation. Art. XII, sec. 2 (1889).	. . . such . . . property as is used exclusively for agricultural and horticultural societies, for educational purposes, places of actual religious worship, hospitals and places of burial not used or held for private or corporate profit and institutions of purely public charity . . . are exempt from taxation but no more land

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	than is necessary for said purposes is exempt. Mont. Rev. Code, sec. 84-202 (1966).
	The following property shall be exempt from taxes:
	(c) property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or the user. Rev. Stat. Neb., sec. 77-202-(1).

NEBRASKA

Exemption of property from taxation. The property of the state and its governmental subdivisions shall be exempt from taxation. The Legislature by general law may exempt property owned by and used exclusively for agricultural and horticultural societies, and property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user. . . . Art. VIII, sec. 2 (1875).	The following property shall be exempt from taxes:
	(c) property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or the user. Rev. Stat. Neb., sec. 77-202-(1).

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NEVADA	
No inheritance or estate tax shall ever be levied, and there shall also be excepted such property as may be exempted by law for municipal, educational, literary, scientific or other charitable purposes. Art. X, sec. 1 (1864).	Exemption of churches, chapels. Churches, chapels and other buildings used for religious worship, with their furniture and equipment, and the lots of grounds on which they stand, used therewith and necessary thereto, owned by some recognized religious society or corporation, and parsonages so owned, shall be exempt from taxation; but when such property is used exclusively or in part for other than church purposes and a rent or other valuable consideration is received for its use, the same shall be taxed. Nev. Rev. Stat., sec. 361.125.
NEW HAMPSHIRE	
[NONE]	The following real estate and personal property shall be exempt from taxation: III. Houses of public worship, parish houses, church parsonages occupied by their pastors, convents and monasteries, buildings used principally for religious training and for other religious purposes and the lands thereto appertaining, owned and occupied by any regularly recognized and constituted denomination, creed or sect, organized or incorpor-

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	ated in this state and the personal property used by them for the purposes for which they are established. N.H. Rev. Stat. Ann., sec. 72:23.
NEW JERSEY	
Exemption from taxation may be granted only by general laws. Until otherwise provided by law, all exemptions from taxation validly granted and now in existence shall be continued. Exemptions from taxation may be altered or repealed, except those exempting real and personal property used exclusively for religious, educational, charitable or cemetery purposes, as defined by law, and owned by any corporation or association organized and conducted exclusively for one or more of such purposes and not operating for profit. Art. VIII, sec. 1, para. 2 (1947).	The following property shall be exempt from taxation under this chapter: All buildings actually used for colleges, schools, academies of seminaries . . . for . . . religious worship or asylums or schools for feeble minded or idiotic persons and children . . . all buildings actually and exclusively used in the work of associations and corporations organized exclusively for the moral and mental improvement of men, women and children, or for religious, charitable or hospital purposes . . . the building actually occupied as a parsonage by the officiating clergymen of any religious corporation of this state . . . . N.J. Stat. Ann., sec. 54:4-3.6.
NEW MEXICO	
The property of the United States, the State and all the Counties, Towns, Cities and School Districts, and other municipal corporations, public libraries, community ditches and all laterals thereof, all	[NONE]

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church property, all property used for educational or charitable purposes, all cemeteries not used for or held for profit, and all bonds of the State of New Mexico, and of the Counties, municipalities and districts thereof, shall be exempt from taxation. Art. VIII, sec. 3 (1911).

STATUTE

NEW YORK

POWER OF TAXATION; EXEMPTIONS FROM TAXATION. Section 1. The power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law. Any laws which delegate the taxing power shall specify the types of taxes which may be imposed thereunder and provide for their review.

Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit. Article XVI, Section 1 (1938).

Section 420. Non-profit organizations. 1. Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, *medical society*, library, patriotic, historical or cemetery purposes, for the enforcement of laws relating to children or animals, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section. Such real property shall not be exempt if any officer, member,

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or employee of the owning corporation or association shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purposes be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees; or if it be not in good faith organized or conducted exclusively for one or more of such purposes.

2. If any portion of such real property is not so used exclusively to carry out thereupon one or more of such purposes but is leased or otherwise used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be exempt; provided, however, that such real property shall be fully exempt from taxation although it or a portion thereof is used (a) for purposes which are exempt pursuant to this section or sections four hundred

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	twenty-two, four hundred twenty-four, four hundred twenty-six, four hundred twenty-eight or four hundred thirty of this chapter by another corporation which owns real property exempt from taxation pursuant to such sections or whose real property if it owned any would be exempt from taxation pursuant to such sections, (b) for purposes which are exempt pursuant to section four hundred eight of this chapter by a corporation which owns real property exempt from taxation pursuant to such section or if it owned any would be exempt from taxation pursuant to such section, [or] (c) for purposes which are exempt pursuant to section four hundred sixteen of this chapter by an organization which owns real property exempt from taxation pursuant to such section or whose real property if it owned any would be exempt from taxation pursuant to such section or (d) for purposes relating to civil defense pursuant to the New York state defense emergency act, including but not limited to activities in preparation for anticipated attack, during attack, or following attack or false warning thereof, or in connec-

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tion with drill or test ordered or directed by civil defense authorities; and provided further that such real property shall be exempt from taxation only so long as it or a portion thereof, as the case may be, is devoted to such exempt purposes and so long as any moneys paid for such use do not exceed the amount of the carrying, maintenance and depreciation charges of the property or portion thereof, as the case may be.

3. Such real property from which no revenue is derived shall be exempt though not in actual use therefor by reason of the absence of suitable buildings or improvements thereon if (a) the construction of such buildings or improvements is in progress or is in good faith contemplated by such corporation or association or (b) such real property is held by such corporation or association upon condition that the title thereto shall revert in case any building not intended and suitable for one or more such purposes shall be erected upon such premises or some part thereof.

4. Such real property shall be so exempt although it is used as a polling place upon days of registration and election.

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5. Such real property owned and actually used for hospital purposes by a free public hospital which depends for maintenance and support upon volunteer charity, shall be so exempt from taxation although a portion thereof is leased or otherwise used for the purposes of income, if such income is necessary for and is actually applied to the maintenance and support of such hospital.

6. Such real property outside a city owned by a free public library or held in trust by an educational corporation for free library purposes shall be so exempt from taxation although a portion thereof is leased or otherwise used for purposes of income, if such income is necessary for and is actually applied to the maintenance and support of such library.

7. Such real property owned for more than one hundred years by a corporation organized exclusively for purposes specified in subdivision one of this section under a grant or devise and a special charter granted by the legislature of the state of New York subject to conditions which raise doubt as to the power of such

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corporation to convey fee title to the property, shall, if the property is used exclusively for educational purposes by an educational corporation which owns real property exempt from taxation, or whose real property if it owned any would be exempt from taxation, as lessee for a term of not less than twenty-five years and if such lease requires the lessee to pay all taxes levied against the property, be exempt from taxation to the same extent and subject to the same conditions and exceptions as property owned and used for educational purposes by a corporation organized exclusively for educational purposes, regardless of whether the moneys paid to the lessor by the lessee are limited to the amount of the carrying, maintenance and depreciation charges of the property.

8. Real property exempt from taxation pursuant to this section shall also be exempt from ad valorem levies and special assessments to the extent provided in section four hundred ninety of this chapter. Real Property Tax Law, section 420.

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NORTH CAROLINA

Property belonging to the State, or to municipal corporations, shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable or religious purposes; . . . . Art. V, sec. 5 (Reaffirmed in the Constitution of 1876).

First provision:
Property belonging to the State, or to municipal corporations, shall be exempt from taxation. The general assembly may exempt cemeteries, and property held for educational, scientific, literary, charitable, or religious purposes; also, wearing-apparel, arms for muster, household and kitchen furniture, the mechanical and agricultural implements of mechanics and farmers, libraries, and scientific instruments to a value not exceeding Three hundred dollars. Art. V, sec. 6 (1868); 5 THORPE 2814.

The following property and no other shall be exempted from taxation.

(3) Buildings, with the land upon which they are situated, lawfully owned and held by churches or religious bodies, wholly and exclusively used for religious worship or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of such building, N.C. Gen. Stat., sec. 105-296.

Note: Original exempting statute, Ch. 696, Laws of 1806, as reprinted in Laws of North Carolina, 1821, reads in part as follows: "That from and after the passage of this Act, all Houses and lots, or other estate real or personal appertaining thereto, set apart and appropriated to divine worship or for education of youth, shall be, and the same are hereby, exempted from all taxes whatsoever, any laws to the contrary notwitystanding."

CONSTITUTION	STATUTE
NORTH DAKOTA	
Exemptions . . . and property used exclusively for schools, religious, cemetery, charitable or other purposes shall be exempt from taxation . . . Art. XI, sec. 176 (1889).	All property described in this section to the extent limited shall be exempt from taxation, that is to say: 7. All houses used exclusively for public worship, and lots or parts of lots upon which such buildings are erected, and any dwellings belonging to religious organizations intended and ordinarily used for the residence of the bishop, priest, rector, or other minister in charge of the services of the church, together with the lots upon which the same are situated. N. Dak. Cent. Code, sec. 47-02-08.
OHIO	
Laws shall be passed, taxing by a uniform rule, all moneys, credits investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property * * * but burying grounds, public schoolhouses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose . . . may, by general laws, be exempted from taxation; . . . . Art. XII, sec. 2 (1851).	The county auditor, at the time of making the assessment of real property subject to taxation, shall enter in a separate list pertinent descriptions of all burying grounds, public schoolhouses, houses used exclusively for public worship, institutions of public charity, real property used exclusively as a home for the aged . . . which are exempt from taxation . . . . Ohio Rev. Code Ann., sec. 5713.07.

CONSTITUTION	STATUTE
OKLAHOMA	
Property exempt from taxation; exemptions under territorial laws; exemption of certain property for limited time. All property used for free public libraries, free museums, public cemeteries, property used exclusively for schools, colleges and all property used exclusively for religious and charitable purposes . . . shall be exempt from taxation. Art. X, sec. 6 (1907).	The following property shall be exempt from taxation: (e) All property used exclusively and directly for fraternal or religious purposes within this state. Okla. Stat. Ann., sec. 68-2405.
OREGON	
[NONE]	Upon compliance with ORS 307.162, the following property owned or being purchased by religious organizations shall be exempt from taxation: (1) All houses of public worship and other additional buildings used solely for entertainment and recreational purposes by religious organizations, and the lots on which they are situated, and the pews or slips and furniture therein. However, any part of any house of public worship which is kept or used as a store or shop or for any purpose other than for public worship or schools shall be assessed and taxed the same as

CONSTITUTION	STATUTE
	other taxable property. (Section ORS 307.162 requires that a claim for exemption be filed each year with the county assessor.) Ore. Rev. Stat., sec. 307.140.

PENNSYLVANIA

The General Assembly may by law exempt from taxation: (1) actual places of regularly stated religious worship; . . . . Art. VIII, sec. 2 (1873), as amended by provision adopted at election April 23, 1968. *First provision:* The rights, privileges, immunities, and estates of religious societies and corporate bodies shall remain as if the constitution of this State had not been altered or amended. Art. VII, sec. 3 (1790); 5 THORPE 3099.	The following property shall be exempt from county, city, borough, town, township, road poor and school tax, to-wit: (a) All churches, meeting houses, or other regular places of stated worship, with the ground thereto annexed necessary for the occupancy and enjoyment of the same. (b) All burial grounds and all mausoleums, vaults, cripts or structures intended to hold or contain the bodies of the dead, not used or held for private or corporate profit. Purdon's Pa. Stat. Ann., tit. 72, sec. 5020-204 (1950).

RHODE ISLAND

[NONE]	The following property shall be exempt from taxation . . . (5) buildings for free public schools, buildings for religious worship and the land upon which they stand and immediately surrounding the same, to an extent not exceeding 1

CONSTITUTION

STATUTE

acre, so far as said buildings and land are occupied and used exclusively for religious or educational purposes; dwelling houses and the land on which they stand, not exceeding one acre in size owned by or held in trust for any religious organization and actually used by its officiating clergymen, ... R.I. Gen. Laws, sec. 44-3-3.

Note: Original exempting statute, Rhode Island Public Laws, 1822, page 317, being section 27, of an "Act regulating to assessing and collecting of taxes," authorized the exemption from taxation of "all estate, real and personal, granted or appropriated to religious uses, or to the use of schools or seminaries of learning within this state."

SOUTH CAROLINA

There shall be exempted from taxation all County, township and municipal property used exclusively for public purposes and not for revenue, and the property of all schools, colleges and institutions of learning, all charitable institutions in the nature of asylums for the infirm, deaf and dumb, blind, idiotic and indigent persons, except where the profits of

The following property shall be exempt from taxation, to-wit:

(14) Churches, etc.—All houses used exclusively for public worship, the books and furniture therein, the ground actually occupied by them, not exceeding two acres, and the parsonage and the lot on which it is situated, so long as no income is derived therefrom.

CONSTITUTION	STATUTE
such institutions are applied to private uses; all public libraries, churches, parsonages and burying grounds; but property of associations and societies, although connected with charitable objects, shall not be exempt from State, County or municipal taxation: Art. X, sec. 4 (1895).	(15) All property real and personal owned by any organized religious society or denomination and used exclusively for the publication of a religious newspaper or other religious publication or publications and all lands and buildings and the contents thereof that may be owned by any religious society or denomination and used exclusively for the convenience of any activities or work of such society or denomination, this exemption not to extend to lands exceeding in any single case two acres. S.C. Code, sec. 65-1522.
Sec. 2. The rights, privileges, immunities, and estates of both civil and religious societies, and of corporate bodies, shall remain as if the constitution of this State had not been altered or amended. Art. VIII, sec. 2 (1790); 6 THORPE 3264.	
(Affirmed by South Carolina Constitution of 1865 and South Carolina Constitution of 1868, Art. IX, sec. 1; Art. IX, sec. 9.)	

SOUTH DAKOTA

Article XI, Section 6: The Legislature shall, by general law, exempt from taxation, property used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, property acquired and used exclusively for public highway purposes, and personal property to any amount not exceeding in value two	All property described in this section to the extent herein limited shall be exempt from taxation: (3) All property belonging to any charitable, benevolent, or religious society and used exclusively for charitable, benevolent or religious purposes. S. Dak. Comp. Laws, sec. 10-4-9.

CONSTITUTION	STATUTE
hundred dollars for each individual liable to taxation. Art. XI, sec. 6 (1889).	
First provision: The legislature shall, by general law, exempt from taxation, property used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, and personal property to any amount not exceeding in value two hundred dollars, for each individual liable to taxation. Art. XI, sec. 6 (1889); 6 THORPE 3378.	

TENNESSEE

Taxation, merchant's and privileges.—All property, real, personal, or mixed, shall be taxed; but the Legislature may except such as may be held by the State, by counties, cities, or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary, or educational, ... Art. II, sec. 28 (1870).	The property herein enumerated shall be exempt from taxation: (2) The real estate owned by any religious, charitable, scientific or educational institution occupied by such institution or its officers exclusively for carrying out thereupon one (1) or more of the purposes for which said institution was created or exists, and the personal property of any such institution used exclusively for one (1) or more of the purposes for which such institution was created or exists. Tenn. Code, ch. 5, sec. 67-502.

CONSTITUTION	STATUTE
TEXAS	
All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the legislature may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, also any property owned by a church or a strictly religious society for the exclusive use as a dwelling place for the ministry of such church or religious society . . . places of burial not held for private or corporate profit, all buildings used exclusively and owned by persons or associations of persons for school purposes . . . . Art. VIII, sec. 2 (1876).	The following property shall be exempt from taxation, to-wit: 1. Schools and Churches.–Public school houses and actual places of religious worship, also any property owned by a church or by a strictly religious society, for the exclusive use as a dwelling place for the ministers of such church or religious society, the books and furniture therein and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same, and which yields no revenue whatever to such church or religious society. Vernon's Tex. Civ. Stat., Art. 7150.
UTAH	
Tangible property to be taxed; value ascertained; properties exempt; legislature to provide annual tax for state. All tangible property in the state, not exempt under the laws of the United States, or under this constitution, shall be taxed in preparation to its value, to be ascertained as provided by law. The property of the state, counties, cities, towns, school districts, municipal corporations and public libraries, lots with the buildings	*Property devoted to public, religious charitable uses or irrigation.*–The property of the United States, of this State, counties, cities, towns, school districts, municipal corporations and public libraries, lots with the buildings thereon used exclusively for either religious worship or charitable purposes, and places of burial not held or used for private or corporate benefit, shall be exempt from taxation. Utah Code, ch. 2, sec. 59-2-1.

CONSTITUTION	STATUTE
thereon used exclusively for either religious worship or charitable purposes and places of burial not held or used for private or corporate benefit, shall be exempt from taxation . . . . Art. XIII, sec. 2 (1896).	
VERMONT	
[NONE]	The following property shall be exempt from taxation: (4) Real and personal estate granted, sequestered or used for public, pious or charitable uses; real property owned by churches or church societies or conferences and used as parsonages and personal property therein used by ministers engaged in full time work in the care of the churches . . . . Vt. Stat. Ann., sec. 32-3802.
VIRGINIA	
Constitution of 1902, Section 183: Property exempt from taxation. Unless otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local, including inheritance taxes . . . . (b) Buildings with land they actually occupy, and the furniture and furnishings therein	The following property shall be exempt from taxation, state and local, including inheritance taxes . . . . (2) Buildings and the land they actually occupy, and the furniture and furnishings therein, and endowment funds lawfullly owned and held by, churches or religious bodies and wholly and exclusively used for religious worship or

CONSTITUTION	STATUTE
and endowment funds lawfully owned and held by churches or religious bodies, and wholly and exclusively used for religious worship, or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building.... Sec. 183 (1902). *First provision:* The legislature may exempt all property used exclusively for State, county, municipal, benevolent, charitable, educational and religious purposes. Art. IX, sec. 3 (1870); 7 THORPE 3894.	for the residence of the minister of any church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building. Va. Code, sec. 58-12. *Original Statutory Provision:* Provided, That no taxes shall be collected on lands, lots, houses, or other property belonging to this Commonwealth, or to any county, town, college, houses for divine worship, or seminary of learning. Statutes of 1800, Virginia Statutes at Large, Shepherd's Continuation of Henning, 1796-1803, page 200; enacted January 23, 1800.
WASHINGTON	
[NONE]	The following property shall be exempt from taxation: All lands used exclusively for public burying grounds or cemeteries without discrimination as to race, color, national origin or ancestry; All churches, built and supported by donations, whose seats are free to all; and the ground not exceeding five acres in area, upon which any cathedral or church of any recognized religious

CONSTITUTION	STATUTE
	denomination is or shall be built together with a parsonage . . . . Wash. Rev. Code, sec. 84.36.020.
WEST VIRGINIA	
. . . but property used for educational, literary, scientific, religious or charitable purposes; all cemeteries and public property may, by law, be exempted from taxation. Art. X, sec. 1–(1872).	All property, real and personal, described in this section, and to the extent herein limited, shall be free from taxation, that is to say . . . property used exclusively for divine worship; parsonages, and the household goods and furniture pertaining thereto; mortgages, bonds and other evidences of indebtedness in the hands of bona fide owners and holders, hereafter issued and sold by churches and religious societies for the purpose of securing money to be used in the erection of church buildings used exclusively for divine worship, and for the purpose of paying indebtedness thereon; cemeteries, property belonging to or held in trust for colleges, seminaries, academies and free schools, if used for educational, literary or scientific purposes, including books, apparatus, annuities, money and furniture . . . property used for charitable purposes not held or leased out for profit; . . . . W. Va. Code, sec. 11-3-9.
First provision: . . . property used for educational, literary, scientific, religious or charitable purposes, and public property, may, by law, be exempted from taxation. Art. VIII, sec. 1 (1861-63); 7 THORPE 4028.	

CONSTITUTION	STATUTE
WISCONSIN	
	The property in this section described is exempt from taxation, to-wit:
[NONE]	(4) Property owned and used exclusively by educational institutions offering regular courses 6 months in the year or by churches or religious, educational or beneficial associations, ... Wis. Stat. Ann., sec. 70.11.
WYOMING	
Exemptions from taxation. The property of the United States, the state, counties, cities, towns, school districts, municipal corporations and public libraries, lots with the buildings thereon used exclusively for religious worship, church parsonages, church schools and public cemeteries, shall be exempt from taxation, and such other property as the legislature may by general law provide. Art. XV, sec. 12 (1889).	The following described property is hereby exempted from taxation: (G) Churches. Lots with the buildings thereon used exclusively for religious worship, church schools and church parsonages. Wyo. Stat., sec. 39-7 (1957).

APPENDIX C

FEDERAL LEGISLATION EMBODYING TAX EXEMPTION FOR RELIGIOUS ORGANIZATIONS*

1. Section 501(c)(3), Internal Revenue Code (1954), exempts "Corporations, Funds, and Foundations organized and operated exclusively for religious purposes***."

2. Section 501(d), Internal Revenue Code (1954), exempts from income tax "religious or apostolic associations or corporations if such associations or corporations have a common treasury or community treasurer.

3. Section 107(1)(2), Internal Revenue Code (1954), excludes from gross income of a minister the "retail value of a home furnished to him as a part of his compensation or rental allowance paid to him.

4. Section 3306(c)(8), Internal Revenue Code (1954), exempts from unemployment taxes "services performed in employ of a religious * * * organization described in Section 501(c)(3) also services performed in any calendar quarter in the employ of an organization exempt under 501(a). See Section 3306(c)(10)(A).

5. Section 3121(c)(8)(B), Internal Revenue Code (1954), exempts from the Insurance Contribution Act service performed in the employ of a religious * * * organization described in Section 501(c)(3) unless the organization files a waiver certificate in accordance with Section 3121(k).

6. Section 3121(k), Internal Revenue Code (1954), provides for waiver of exemption from Social Security

*This is a representative, but not an all-inclusive, list of the federal exemptions.

by organizations described in section 501(c)(3) which are exempt from income tax under section 501(a).

7. Section 6033(a), Internal Revenue Code (1954). Every organization, except as herein provided, exempt from taxation under Section 501(a) shall file an annual return.

It is provided in Sub-section 6033(a)(1), Internal Revenue Code (1954), that no such annual return need be filed by any organization exempt from taxation under the provisions of Section 501(a) which is a religious organization described in Section 501(c)(3).

8. Section 511(a)(2)(A), Internal Revenue Code (1954). This subsection exempts from the unrelated business tax "a church, a convention, or association of churches."

9. Section 2055(a)(2), Internal Revenue Code (1954), allows deduction from gross estate for estate tax purposes for any bequest "to or for the use of any corporation organized and operated exclusively for religious, charitable * * * educational purposes * * *."

10. Section 503(b)(1), Internal Revenue Code (1954), exempts from prohibited transaction penalty "a religious organization (other than a trust)."

11. Section 2522(a)(2), Internal Revenue Code (1954), allows a deduction for gifts made to "a corporation or trust or Community Chest, fund or foundation organized and operated exclusively for religious * * * purposes."

12. Section 170(b)(1)(A)(i), Internal Revenue Code (1954), provides that an additional 10% deduction is available to a donor who makes a contribution to "a

church convention, or association of churches."

13. The importation of religious goods and items for religious institutions are admitted free of duty—Tariff Classification Act of 1962, Schedule 8, Part 4, Items 850.10, 850.30, 850.40, 850.50, 850.70, 851.20, 851.30, Title 19, USCA.

APPENDIX D

SOME EARLY TARIFF EXEMPTIONS ON RELIGIOUS GROUNDS

From Private Acts of the 12th Congress, Chapter XVII

"An Act for the relief of the Bible Society of Philadelphia.

"Be it enacted, etc. That the duties arising and due to the United States upon certain stereotype plates imported during the last year into the port of Philadelphia on board the ship Brilliant, by the Bible Society of Philadelphia, for the purpose of printing editions of the Holy Bible, be, and the same are hereby remitted, on behalf of the United States, to the said society; and any bond or security given for the securing of the payment of the said duties shall be cancelled.

"Approved, February 2, 1813," United States Statutes at Large, Volume 6, Private Acts, 1st to 28th Congress, 1789-1845, page 116. (Note: Mr. Madison was President at this time.)

From Private Acts of the 14th Congress, Chapter XLI

"An Act for the relief of the Baltimore and Massachusetts Bible Societies.

"Be it enacted that all the duties due and payable to the United States, on a set of stereotyped plates, owned by the Baltimore Bible Society, imported from London to Philadelphia, in the year one thousand and fifteen, on board the ship Electra; and from London to Baltimore, in the same year, on board the ship Joseph, be, and the same are hereby remitted.

"Sec. 2. And be it further enacted, that the Comptroller of the Treasury be, and he is hereby authorized to direct a debenture to be issued to the Massachusetts Bible Society, for a drawback of duties upon an invoice of Bibles exported from the port of Boston, on board the brigantine, Panther, in the year one thousand eight hundred and fifteen; Provided, however, that the said Society shall produce satisfactory evidence to the same comptroller, as the law directs, that the invoice has been landed in some foreigh port of place."

"Approved, April 20, 1816." *Supra*, page 162

(Note: Mr. Madison, President)

Customs exemption for vestments, etc., imported by Bishop Flaget

Report, "Communicated to the House of Representatives May 10, 1826.

"Mr. Marvin, from the Committee on Ways and Means, to whom was referred the petition of Benedict Joseph Flaget, Bishop of Bardstown, in the State of Kentucky, made the following report:

"The petitioner prays to be exonerated from the payment of the duties upon certain articles, consisting of vestments, furniture and paintings, presented to him for the use of the Church over which he presides, and which have been imported into the United States, and which are intended solely for the use of said church, as connected with its religious worship.

"The committee are of the opinion the articles referred to by the Memorialist, not having been purchased or imported by him with a view to commercial

profits, and not being articles of consumption except as connected with the service of the church over which he presides, it is but reasonable to exempt them from the payment of duties. In adopting this principle, the committee are satisfied they propose only to extend to the Bishop of Bardstown, privileges similar in character to those which have from time to time been extended to various religious societies and institutions in different sections of the country. The committee have therefore reported a bill." American State Papers, Vol. 5. Finances, page 501.

On the basis of this report, Congress enacted, Chapter XCI, Act of May 20, 1826, "An Act for the relief of Joseph Flaget, bishop of Bardstown, in the state of Kentucky.

"Be it enacted, etc. That the duties due and payable on certain vestments, furniture and paintings, imported into the United States by Benedict Joseph Flaget, bishop of Bardstown, in the State of Kentucky, for the use of the church over which he presides, and recently entered at the customs house in the city of New York, be, and the same are hereby remitted." *Supra*, page 46.

Other early tariff exemptions on religious grounds–private bills

Chapter CI, Act of May 25, 1832, for the relief of John Hughes, provides for the "refund to the Reverend John Hughes of Philadelphia" of duties on "church vestments and ornaments" and "church plate", "the said articles being donated for the use of the church whereof said John Hughes is pastor." *Supra*, page 491.

Chapter CCLIX, Act of June 30, 1834, provided for remission of duties on "a set of fine bells, with their necessary appanages of brass, iron and wood, being donations by individuals residing in Europe to the Roman Catholic Church at St. Louis, Missouri * * *." *Supra*, page 600.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 135.

FREDERICK WALZ,
Appellant,

v.

TAX COMMISSION OF THE CITY OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND
BRIEF FOR MADALYN MURRAY O'HAIR and SOCIETY OF SEPARATIONISTS, INC. AS AMICI CURIAE.

MADALYN MURRAY O'HAIR
Attorney for O'Hair, Amicus Curiae, pro se.
P. O. Box 2117
Austin, Texas 78767

JAMES H. ANDERSON, JR.
Attorney for Society of Separationists, Inc., Amicus Curiae
2204 Eutaw Street
Baltimore, Maryland 21217

OLA BOSWELL
Vermont Avenue
ington, D.C. 20005

24 September 1969.

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Madalyn Murray O'Hair and the Society of Separationists, Inc., hereby respectfully move for leave to file the accompanying brief amici curiae in this case in support of appellant as provided in Rule 42 of the Rules of this Court. Appellee has consented. (Appendix) Appellant, a recluse, has not given reply to requests, and it is not known if he has received them. (See memorandum in appendix from the United States Post Office.)

Madalyn Murray O'Hair is the founder and director of the Society of Separationists, Inc. She is the sole national spokesman for the nation's known six and one half million non-believers in religion and was the principle litigant in the case of Murray v. Comptroller of the Treasury, 241 Md. 383, cert. den. 385 U.S. 865 (1966) which was identical to the case at issue.

The Society of Separationists, Inc. is a Maryland corporation, headquartered in Austin, Texas, organized nationally, having an affiliation of thirty thousand families. Its president is Richard F. O'Hair.

The primary and corporate purpose of the Society of Separationists, Inc. is to advocate, labor for, and promote in all lawful ways, the complete separation of state and church, and inter alia to sustain and popularize a movement to tax the church, which the society apprehends should bear its fair share of the real estate tax burden.

The issue posed in this case is a primary raison d'etre of the corporation, responding to the concerns of its affiliates and the desires of the inarticulate and unorganized non-religious people of America. The Society of Separationists, Inc. has been very active in expressing and implementing considered presentations of the arguments in support of separation of church and state on university and college campuses, on television, radio and by

means of its own radio series and regular publications, as well as by litigation.

The function of this amicus curiae is to present additional information to the court, which has not been covered, *at all*, by the survey of the problem involved, to be used as source reference by the court and both litigants.

The attached brief is submitted in the hope that it will assist the court in its deliberations.

For the foregoing reasons, the amici curiae respectfully request that this motion be granted.

Respectfully submitted,

MADALYN MURRAY O'HAIR
P. O. Box 2117
Austin, Texas 78767
Attorney for Amicus Curiae,
O'Hair, pro se.

JAMES H. ANDERSON, JR.
2204 Eutaw Street
Baltimore, Maryland 21217
Attorney for Amicus Curiae,
Society of Separationists, Inc.

LOLA BOSWELL
1010 Vermont Avenue
Washinton, D.C. 20005

24 September 1969.

Certificate of Service:

A copy of the foregoing Motion, together with brief amici curiae attached were served on the appellant by mailing a copy to the appellant, Frederick Walz to 60 East 42nd Street, New York, New York, 10017, and a copy of the foregoing Motion, together with brief amici curiae attached were served on the appellee by mailing a copy to the appellee's attorney, J. Lee Rankin, Corporation Counsel, Municipal Building, New York, New York, 10007, this 20th day of September 1969.

MADALYN MURRAY O'HAIR
pro se for Amicus Curiae

LOLA BOSWELL
)10 Vermont Avenue
shington, D.C. 20005

JAMES H. ANDERSON, JR.
Attorney for Amicus Curiae,
Society of Separationists, Inc.

APPENDIX

to Motion for Leave to File Amici Curiae.

Letters requesting the consent of the appellant and the appellee for the filing of this brief amici curiae in support of the appellant were timely mailed by the amici curiae.

The attorney for the appellee, J. Lee Rankin, Corporation Counsel for the City of New York, Law Department, Municipal Building, New York, New York, 10007, experienced prompt delivery and made reply on August 18th, 1969, giving consent.

In respect to delivery of the request to appellee, Mr. Frederick Walz, 60 East 42nd Street, New York, New York, 10017, the United States Post Office, New York City, New York, failed to return POD Form 3849 "Notice of Mail Arrival or Attempted Delivery" although a fee was paid for this.

An inquiry and search was instituted by the Claims, Inquiries, Permits, section of the United States Post Office, Austin, Texas, and on September 12, 1969, a photostatic copy of the delivery memorandum, on file in New York, was mailed by the Austin, Texas, Post Office to the amici curiae. This is here reproduced and indicates that a person, one "Carlson" signed for this consent request at the late date of 15 August 1969 and it is not known if the request for consent was ever indeed received by Mr. Walz, appellant, whom this brief supports.

IN THE
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ON APPEAL FROM THE COURT OF APPEALS OF THE
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BRIEF AMICI CURIAE ON BEHALF OF MADALYN MURRAY O'HAIR AND SOCIETY OF SEPARATIONISTS, INC., URGING REVERSAL.

I

THE INTEREST OF THE AMICI CURIAE

The interest of the amici curiae is indicated in the motion for leave to file brief amici curiae, attached hereto, and made a part of this presentation.

ARGUMENT

Seventy four million persons in America are NOT church members. Over one hundred million Americans do not attend church.

Each year the religious community of the United States reports its 'membership,' which is carefully compiled in the *Yearbook of American Churches,*[1] published by the Office of Planning and Programing, National Council of Churches.[2] This is then analyzed and reported in the *Statistical Abstract of the United States,* issued yearly by the United States Department of Commerce, Bureau of Census.

The United States government makes no survey of religion, official or unofficial. Organized religion created a national furor when the last attempt at survey was proposed for the 1960 census.[3] The only nose count in respect to religious beliefs is that now undertaken by the National Council of Churches, and given quasi-official status by inclusion in the *Statistical Abstract of the United States.*

The Supervisor of the Statistical Information Division of the Bureau of Census, upon whom the responsibility for accuracy

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1. Whitman, Lauris B., editor, *Yearbook of American Churches, 36th Issue, Annual Edition for 1968,* (New York, N.Y.: Council Press, 1969).

2. Lerner, William (prepared under direction of) *Statistical Abstract of The United States, 1968, 89th Annual Edition.* (Washington, D.C.: U.S. Government Printing Office, 1969).

3. Stokes, Anson Phelps and Pfeffer, Leo, *Church and State in the United States,* (New York: Harper and Row, 1950) pp 571-576.

of reported material falls, very carefully, each year, puts an explanatory note at the head of that section dealing with church membership claims of religious bodies, in America:

> ". . . not all groups follow same calendar year nor count membership in the same way; some groups give only approximate figures. Roman Catholics count all baptized persons, including infants; Jews regard as members all Jews in communities having congregations; Eastern Orthodox churches include all persons in their nationality or cultural groups . . . many Lutheran bodies and Protestant Episcopal Church now report all baptized persons . . .".[4]

Churches use actuary methods according to probabilities based on primary statistical records for estimates in respect to those persons who were once received into the church (baptism, as an example) but who never show up in a church again during their adult life. Life expectations of remaining in that faith give a hopeful rather than an accurate percentage of religious convictions of our population. Duplication is not taken into account although it is common knowledge that many persons switch church allegiances (notably at the time of marriage) and are then counted in one group as having been baptized there, and in another group as being a communicant, and perhaps in a third group as an actual attending member.

Turning to the *Yearbook of American Churches* for 1968, which is the last available, and verifying this with reporting in the current *Statistical Abstract of the United States* (1968), we find the following as authenticated:

(1) 321,070 churches in the United States, report
(2) 204,161 'pastors with charges,' and
(3) 123,826,000 'inclusive' members.[5] [6]

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4. Lerner, p. 41.
5. Whitman, p. 193 ff.
6. Lerner, p. 41.

Of the 'inclusive' members (which number is obtained by the above indicated actuary method of counting) full, communicant or confirmed membership is shown at 47,372,058.[7] This figure is very small because the National Council of Churches can not verify the claims of two groups: the Roman Catholics and Jews, which figures are reported as "Not Available"[8] in other terms than 'inclusive.' In this group of 'inclusive' or claimed membership, these two religions report:

(1) Roman Catholics, 46,864,910[9]
(2) Jews, 5,725,000.[10]

Added to the above 'full, communicant or confirmed' members and accepted as such, this would still only indicate 100,961,968 actual members at best, in a population roughly twice that figure.

The problem in relation to Roman Catholic claims can be easily exampled. In the 1964 Official Catholic Directory (the last year available to this author) the New York archdiocese consisting of the boroughs of Manhattan, Bronx, and Richmond, and some territory across the Hudson in New Jersey, had a population of 4,980,000 of whom 1,782,630 or 35.8% were claimed as Roman Catholics. The report then continues that these were served by 402 parish churches and 602 'chapels'.[11] This is an average of 1,775 members active in each parish church or 'chapel', which figures test the credulity of any investigator.

The problem in relation to Jewish claims is evident. Every one in this ethnic group is counted as a member without reference to Synagogue commitment or attendance.[12]

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7. Whitman, p. 193.

8. Whitman, p. 198, p. 200.

9. Whitman, p. 200.

10. Whitman, p. 198.

11. *Official Catholic Directory*, (P. J. Kenedy and Sons, New York, 1964).

12. Lerner, p. 41.

In this argument, we will deal with the 'optimum' figure of church claims, to wit: 123,826,000 'inclusive' members, even though it is obviously fallacious. We accept the figures for 'argument sake' since they have been given authenticity by their inclusion in the official governmental *Statistical Abstract of the United States.*

The total resident population of the United States, as of July 1, 1967 was 197,863,000.[13] (All figures here reported are as of that date.)

This leaves 74,037,000 persons who have elected, voluntarily, to remain outside of churches during any period of their lives.

The *Yearbook of American Churches, 1968* lists 40,967,000 in Sunday and Sabbath School enrollment[14] and *Statistical Abstract of the United States, 1968* clarifies this by noting that this figure includes pupils, officers and teachers also.[15] There are 70,775,000 persons under 18 years of age reported in the United States for this period.[16] A breakdown study reveals then, using only church provided statistics which are prima facie exaggerated, that in the United States, there may be:

'inclusive' church members		non-church persons
82,859,000		44,229,000
40,967,000	under 18	39,808,000

In March, 1957, the Bureau of Census, Department of Commerce, made an inquiry on religion asked of a national sample of individuals on a voluntary basis. Answers were channeled into five categories: (1) Catholic, (2) Jewish, (3) Protestant, (4) all others, and (5) none.[17] The result of this was

13. Lerner, p. 10.
14. Whitman, p. 193.
15. Lerner, p. 42, 43.
16. Lerner, p. 25.
17. Stokes, p. 574.

that 2.67% of the 1957 population, i.e., 3,195,000 persons reported no religion at all.[18] If it can be assumed that this percentage has held steady (any difference would be an increase) to the time here under study, based on that population, there are 6,512,942 persons who have no religion at all. These are scattered in the statistics of both church and non-church members since Atheist organization studies[19] show that persons having no religion tend to remain in the church structure as participating members for social and business reasons.

That the claims for 123,826,000[20] 'inclusive' members are specious is further evidenced by polls taken by the American Institute of Public Opinion[21] and reported by the National Council of Churches.[22] The results of the polls making inquiry as to church attendance is as follows:

Date	Per Cent of Adults Attending Church	Date	Per Cent of Adults Attending Church
1939	41	1958	49
1940	37	1959	47
1942	36	1960	47
1947	45	1961	47
1950	39	1962	46
1954	46	1963	46
1955	49	1964	45
1956	46	1965	44
1957	47	1966	44

18. Lerner, p. 41. Cited by Mr. Justice Clark, in *Abington School Dist. v. Schempp.* 374 U. S. 213.

19. *Survey, American Atheists,* Archives of Society of Separationists, Inc., Austin, Texas, 1963.

20. This figure includes 1,789,175 'inclusive' members of the Church of Jesus Christ of Latter Day Saints (popularly known as 'Mormons'), not reported by *Yearbook of American Churches.*

21. Princeton, New Jersey.

22. Whitman, p. 228.

There has been a decline since 1966.[23] There has not been a report of 50% attendance in all of the reported years. This would appear to affirm that over one hundred million Americans do not attend church.

Attorney Walz, appellant in this case, therefore, represents in his claim perhaps half of America since he states that he is a 'Christian' who does not attend church and can not be identified as belonging to any denomination.[24] However, he is most probably still counted in the 'inclusive' membership of the original church in which he had his baptism.

The case against church statistics has been succinctly put by one newsman reporting on the dissatisfaction of one young minister who quit his church:*

> "It had long troubled me that we listed 800 members and only half ever came to church even periodically," he said. "At least 100 'members' no longer even lived in the suburb. Why should we continue to carry this deadwood? It cluttered up the rolls, demeaned the image of the church . . ."

A survey of historical statistics indicates that non attendance at church, indeed non-membership in church, is a continuing American phenomenon. Since church leaders in the colonial period took their religion very seriously and we have a plethora of records in respect to their opinions, we are inclined to overestimate the church devotion of the majority of the population then, as we do now. Even the stringent laws of the colonial period could not coerce attendance or participation. The number of church members was almost everywhere very small. There were only 3,105 congregations of all churches at

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23. *Reader's Digest Almanac and Yearbook, 1969* (Pleasantville, New York: The Reader's Digest Association, Inc., 1969) p. 409.

24. See Appellant's "Brief in Opposition to Motion to Dismiss Appeal," filed with the Supreme Court of the United States on June 12, 1969, in Walz v. Tax Commission of the City of New York, No. 135, October Term, 1968.

*Balk, Alfred, *The Religious Business*, Richmond, Virginia: The John Knox Press, 1968.

the close of the colonial period,[25] in a population of 2,781,000 in 1780. Even in New England, the most churched section of the thirteen colonies, there was not more than one church member to every eight persons in the total population.[26] Church affiliation at the founding of the republic was limited to four per cent of the population.[27]

A Federal law prescribed for the first time in 1850 that 'social statistics' be collected and one of the subjects under that category was 'religious organizations.'[28] The first efforts gave very inaccurate returns since each denomination was asked for the number of churches, church accommodations, and *the value of church property* (to be discussed later in this report). In the 1890 census expanded lists of items of information were requested of the religious institutions and in the years 1906, 1926 and 1936 serious efforts were made to gather complete information. These reveal:

Year	Total Population[29]	"Church Edifices"	'Inclusive Church Membership' given as a percentage of population.[30]
1780	2,781,000	3,105	4%
1785	3,600,000		
1850	23,191,876		16%
1860	31,443,321		23%
1870	39,818,449		18%
1880	50,155,783		20%
1890	62,947,714		22%

25. Sweet, William Warren, *The Story of Religion in America,* (New York, Harper & Brothers, 1930 IV, p. 5).

26. Pfeffer, Leo, *Church, State and Freedom,* (Boston, Mass., The Beacon Press, 1953) p. 85.

27. Moehlman, Conrad H., "In Defense of McCollum v. Board of Education," *American Bar Association Journal,* April 1952 (Vol. 39) p. 345.

28. Bureau of Census, Census of 1870.

29. Lerner, p. 5.

30. Reader's Digest Almanac and Yearbook, 1969, p. 409.

1900	75,994,575	36%
1906	199,831[31]	
1910	91,972,266	43%
1916	203,432[32]	
1920	105,710,620	43%
1926	210,924[33]	
1930	122,775,046	47%
1936	179,742[34]	
1940	131,669,275	48%

The entire judicial and legislative history of religion in the United States has been the struggle for disestablishment. As a minor but contributing factor to our colonization, there was first the flight of people from European state religions and the tragedy of the error of establishment immediately repeated on our shores. Except for a very few and scattered islands of partial enlightenment (Rhode Island being the best thereof), in every colony there was free use of government coercion to compel religious conformity and monetary support of the established state or colonial religion. A few samples suffice:

> The "Lawes Divine Moral and Martial" decreed by Governor Thomas Dale, (Vriginia) in 1612 provided a death penalty for speaking impiously of the Trinity, one of the Divine Persons, or against any known article of the Christian faith. A third offense of breaking the Sabbath was punishable by death. The third offense of 'cursing' was punishable by death.[35]

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31. Bureau of Census Special Reports: Religious Bodies (Washington, D.C. U.S. Government Printing Office, 1906) Vol. 1, p. 33.

32. Bureau of Census Special Reports: Religious Bodies (Washington, D.C. U.S. Government Printing Office, 1916) Vol. 1, p. 42.

33. Bureau of Census Special Reports: Religious Bodies (Washington, D.C. U.S. Government Printing Office, 1926) Vol. 1, p. 20.

34. Bureau of Census Special Reports: Religious Bodies (Washington, D.C. U.S. Government Printing Office, 1936) Vol. 1, p. 24.

35. Cobb, Sanford H. The Rise of Religious Liberty in America, New York, The MacMillan Co., 1902, p. 78.

No Catholic was permitted to enter Massachusetts and in 1647 the General Court there decreed that any person not freeing himself of suspicion "shall be jailed, then banished. If taken a second time, he shall be put to death."[36]

In Maryland, the much publicized "Act of Toleration" of 1649 imposed the death penalty on any person blaspheming God, or denying Jesus Christ to be the Son of God, or denying the Holy Trinity.[37]

In Pennsylvania, the Great Law, enacted in 1682 required acknowledgement of "one God," profanity was penalized, Sunday observance was required, and neither Catholics or Jews enjoyed freedom to worship.[38]

In Rhode Island, the law enacted limited citizenship and eligibility to public office to Protestants and in 1762, the Superior Court of that colony refused the application of two Jews for citizenship.[39]

In New York in August 1700, a law was enacted to banish "any Jesuit, priest or other ecclesiastic ordained by the Pope."[40]

State enforced religious bigotry ran high until after the Massachusetts witch trials of 1692.[41] It did not disappear after this; indeed nine of the thirteen colonies still had established

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36. Sweet, W. W., Religion in Colonial America, New York, Charles Scribner's Sons, 1942, p. 146.

37. Adler, Mortimer, J. ed., The Annals of America, Vol. 1, 1493-1754, Chicago, Illinois, William Benton, Publisher, 1968, p. 88.

38. Pfeffer, Leo, Church, State and Freedom, Boston, the Beacon Press, 1953, p. 79.

39. Blau, Joseph L. Cornerstones of Religious Freedom in America, Boston, Beacon Press, 1949, p. 43.

40. Myers, Gustav, History of Bigotry in the United States, New York, Random House, 1943, p. 94.

41. Cassels, Louis, "A Cherished National Myth – Separation of Church, State," a United Press release of August 31, 1968.

churches at the time of the Revolution, 1776 to 1784.[42] Although the national leaders then saw the compelling necessity of disestablishment for the federal government, the states did not see it necessary for themselves. By the time of the adoption of the First Amendment to the Constitution on December 15, 1789, four states still retained established churches. These were Massachusetts, Maryland, Connecticut and New Hampshire. Connecticut maintained an established church until 1818, New Hampshire until 1819 and Massachusetts kept on taxing its citizens for support of the Congregational clergy until 1833.[43]

When the First Amendment was added to the Constitution, it specifically forbade the Congress of the United States to make a law respecting an establishment of religion. This clause, however, applied only to the Federal government and not to the state governments, and, as indicated in the summary given by Mr. Chief Justice Waite in *Reynolds v. United States*,[44] and by Justice Black in *Everson v. Board of Education of Ewing Tp.*,[45] drew its content and meaning from the contest waged against the established Church of England (Episcopal Church) in Virginia.

The amendment was clearly not applicable to the states of the union. In 1833, the Supreme Court, in *Barron v. Baltimore*,[46] held that no part of the Bill of Rights restrained the states, and in *Permoli v. First Municipality of New Orleans*,[47]

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42. The Church of England was the official church in six colonies, Virginia, Maryland, North Carolina, South Carolina, Georgia and New York. In three, Massachusetts, Connecticut and New Hampshire, the Congregational Church was supported in each town by taxation, and remained established as the official church. Beard, Charles and Beard, Mary, *New Basic History of the United States*, Garden City, New York, p. 76.

43. *Engel v. Vitale*, 82 S. Ct. 1261 (1962) at page 1265.

44. 98 U. S. 145 (1878).

45. 67 S. Ct. 504.

46. 7 Pet. 243 (1833).

47. 44 U. S. 589 (1845).

ruled specifically that "The Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the constitution of the United States in this respect to the states."

This may well be explained by the attitude of the national leaders at that time in respect to the established state religions of the day, which were Christians. Our national leaders were for the most part Deists. (Deism: a movement or system of thought advocating natural religion based on human reason rather than revelation, emphasizing morality and in the 18th Century denying the interference of the creator with the laws of the universe.[48]) Included in their ranks were the first four presidents of the United States, George Washington, John Adams, Thomas Jefferson, Thomas Madison, Thomas Paine, Benjamin Franklin, George Mason, Ethan Allen. Thomas Paine's writings[49] on this matter were so widely known and accepted by the leaders of the revolutionary movement that they were cited in the arguments before the Supreme Court by Mr. Daniel Webster, counsel for the complainant-appellants in Vidal et al. v. Girard's Executors.[50]

Indeed a striking feature of the times was the evasion of the use of the word "Christian" in respect to the religion embodied in official national declarations. The Constitution of the United States does not contain one word of reference to this religion which was then the dominant one of each state of the union. Article II, Section 8[51] was written as an escape clause for those who did not care to be identified with the "oath" taking of Christianity. The Declaration of Independence refers in ordi-

48. *Webster's Seventh New Collegiate Dictionary*, G. & C. Merriam Co., Springfield, Massachusetts, 1963, p. 217.

49. The Age of Reason, published in 1792.

50. 43 U. S. (2 How.) 127 (1844).

51. "Before he enters on the Execution of his Office, (i.e. the President of the United States) he shall take the following Oath or affirmation: – "I do solemnly swear (or affirm) . . .

nary deistic manner to "Nature and Nature's God," "Creator," and "Divine Providence." Concentrated reading of any document of this era brings one to an immediate realization of to what extent the writers would go in order to avoid the mention of the term "Christian."

This culminated in the famous Treaty of Tripoli, concluded by the United States, with Tripoli on February 10, 1797. The treaty was ratified by the Senate in June of the same year. Article XI of the Treaty states:

> "As the government of the United States is not, in any sense, founded on the Christian religion; as it has in itself no character of enmity against the law, religion, or tranquility of Musselman; and as the States never have entered into any way or act of hostility against any Mohometan nation, it is declared by the parties that no pretext arising from religious opinion shall ever produce an interruption of harmony existing between the two countries."[52]

The same official statements about the relationship of Christianity to government and governmental policy were incorporated in separate treaties with Algiers and Tunis.[53]

This did not all go unnoticed by the Christian community. On October 27, 1789, the "First Presbytery Eastward in Massachusetts and New Hampshire" made a protest to George Washington because there was no "explicit acknowledgment of the only true God and Jesus Christ whom He has sent, somewhere in the Magna Charta of our country." In 1793, the year Philadelphia was stricken by the yellow fever, the Rev. John Mason preached a sermon in which he declared the plague was sent as a visitation from God (i.e. Christian God) because

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52. Stokes, Anson Phelps, *Church and State in the United States, Vol. I*, Harper & Brothers, New York, 1950, p. 497.

53. 8 Stat. 226, see Hunter, Miller, *Treaties and Other International Acts of the United States of America, Vol. II.*, U.S. Government Printing Office, 1931, p. 365.

He was not recognized in the supreme law of the land. At this time the capital of the United States was situated in Philadelphia, Pennsylvania. In 1803, the Reverend Samuel B. Wylie, Doctor of Divinity of the University of Pennsylvania preached a sermon in which he said, "Did not the framers of this instrument in this . . . resemble the fool mentioned in Psalms 14:1-3, who said in his heart, 'There is no God'?" In 1811 Samuel Austin, Doctor of Divinity, afterwards president of the University of Vermont, preached a sermon in Worcester, Massachusetts, in which he said that lack of recognition of God was the "capital defect" in the Constitution, which "will issue inevitably in the destruction of the nation."[54]

After the death of George Washington a prayer was forged to have him utter the only reference to Jesus Christ in his writings. The original letter from which the prayer was manufactured is to be found in Washington's writings,[55] and the forgery persists most notably in display on a bronze tablet in St. Paul's Chapel in New York City.[56] It has been this important to the Christians of the nation to have at least the founding father squarely in the Christian, rather than the Deistic, ranks.

The Christian church embattled on the national level, held on in the states everywhere it could. As indicated, Connecticut's church did not yield its grip until the new constitution was adopted there in 1818. Massachusetts in a constitutional amendment finally separated church and state in 1833. In New York and New England states' assistance to churches in the form of land endowments persisted until about 1800. After churches were stripped of taxes from general funds the churches

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54. O'Hair, Madalyn Murray, "The U.S. Congress and the Religionists," Austin, Texas, Society of Separationists, Inc., 1969.

55. Ford, W. C. ed., Washington's *Writings*, Vol. 10, p. 254-265, also see official government edition of Washington's *Writings*, edited by J. C. Fitzpatrick, Vol. 24, pages 483, 496.

56. O'Hair, Madalyn Murray, "Rewriting of History by Christians," Austin, Texas, Society of Separationists, Inc., 1969.

were still given power to themselves tax their adherents.[57] Disestablishment was only won by 1868, and only with separation of state and church came any real freedom of worship.

Even after the era of state churches finally came to a close, legislatures and courts continued to give favored treatment to the Christian religion as opposed to all other faiths. The most articulate promoters of the principle of disestablishment were found on the national level and the state governments and courts needed to be brought up to the level of sophistication in religious politics which was manifested at the national level.

The root of the argument in respect to the deference to the Christian religion in the law of the land came out in the disagreement of Mr. Justice Story and Thomas Jefferson. Mr. Story's remarks are quoted often, and tellingly, to give substance to the argument forwarded by the Christian community that the First Amendment must be read in the light of the prevailing practices among the states when the First Amendment was proposed and adopted, and that these practices were for encouragement of Christianity, monetarily and otherwise. The famous argument reads:

"Every American colony, from its foundation to the revolution, ... did openly, by the whole course of its laws and institutions, support and sustain in some form the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. ... Probably at the time of the adoption of the Constitution, and of the amendment to it ... the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state.... The real object of the amendment was not to countenance, much less to advance, Mohometanism, or Judaism, or infidelity, by prostrating Christianity, **but to exclude all rivalry among Christian sects,** (emphasis added) and to prevent any national

57. Paulsen, Monrad G., "Preferment of Religious Institutions in Tax and Labor Legislation" *Law and Contemporary Problems*, Vol. 14, No. 1, (Winter, 1949) pp 144-159.

ecclesiastical establishment which would give to a hierarchy the exclusive patronage of the national government."[58]

Story later reaffirmed this expression of opinion in the case of Vidal et al v. Girard, "It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania."[59]

Jefferson was incensed by the interpretation given by Story and wrote a memorandum strongly disputing the accuracy of the maxim that Christianity was a part of the common law. His study is a careful historical one.[60]

Later writing to John Cartwright, concerned with a book of Cartwright's he wrote in a letter dated June 5, 1824.

> "I was glad to find in your bock a formal contradiction, at length, of the judicial usurpation of legislative powers; for such the judges have usurped in their repeated decisions that Christianity is a part of the common law. The proof of the contrary, which you have adduced is incontrovertible; to wit, that the common law existed while the Anglo-Saxons were yet pagans, at a time when they had never yet heard the name of Christ pronounced, or knew that such a character had ever existed. (Then after summarizing his early memorandum and challenging the best-read lawyer to produce another script of authority for this judicial forgery, he concludes) What a conspiracy this, between Church and State!".[61]

Jefferson evaluated his best piece of work to be his Bill for Establishing Religious Freedom (introduced into the Virginia

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58. Story, Joseph, *Commentaries on the Constitution of the United States*, Vol. III, Boston, Hillard, Gray, 1833, pp. 724-26.

59. 2 How. 127 (1844) at page 94.

60. Pfeffer, Leo, *Church, State and Freedom*, Boston, Beacon Press, 1953, p. 214; see also Howe, Mark De Wolfe, *Cases on Church and State in the United States*, Cambridge, Harvard University Press, p. 8-15.

61. *American State Papers on Freedom in Religion*, Washington, D.C. Religious Liberty Association, 1949, p. 652 ff.

Legislature in 1779[62]) and writing about that in his autobiography,[63] he said,

> "Where the preamble declares that coercion is a departure from the plan of the holy author of our religion, an amendment was proposed, by inserting the word Jesus Christ, so that it should read a departure from the plan of Jesus Christ, the holy author of our religion. The insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mohometan, the Hindoo, and infidel of every denomination."

It is not a well known fact that Jefferson was so critical of the religion of Christianity that he created his own Bible. He introduced it as "a wee-little book" and called it "The Philosophy of Jesus Christ" pruned of the impurities of established religion.

> "It is," he wrote, "a paradigma of his doctrines, made by cutting the texts out of the book and arranging them on the pages of a blank book, in a certain order . . ."

> "In extracting the pure principles which he taught, we should have to strip off the artificial vestments in which they have been muffled by priests, who have travestied them into various forms as instruments of riches and power for themselves."[64]

The results was an octavo of forty six pages of "pure and unsophisticated doctrines" and is currently available under the title of "The Jefferson Bible," see reference for publisher.

An 'established church' is a financed church. The struggle for disestablishment has always revolved around financial issues.

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62. Swancara, Frank, Separation of Religion and Government, New York Truth Seeker Company, New York, 1950, p. 156.

63. *Writings of Jefferson*, (Ford ed.), Vol. I, p. 62.

64. Jefferson, Thomas, *The Jefferson Bible*, The Life and Morals of Jesus of Nazareth, New York, Clarkson Potter, Inc., 1964, see page 325 for quotations.

Justice Douglas in Abington School Dist. v. Schempp[65] in defining an establishment of religion notes that in each such case, "the church typically has a place in the state's budget." We need now, therefore, to look at the fight in respect to taxation of the churches, and it has continued without interruption for the life of our Republic.

The initial battle for disestablishment, particularly in Virginia, was fierce. In that state legislative acts in 1799 and 1802 provided for seizure of every type of tangible property held by the churches. The state took church buildings, grounds, glebes and other real estate, the bells from church towers, church furnishings, books, records of the parish, and even Communion silver, everything which had belonged to the "Established Church of Virginia" on July 5, 1776.[66] All properties were sold, and the money was to be used for public purpose, and religion was not "a public purpose."[67]

A primary principle of taxation was invested in corporate status in colonial days. Incorporation gave unusual rights, notably the power to tax and was remindful of the ecclesiastical corporations[68] such as had existed in England and around which the land and bitter strife of "Mortmain" raged. The strife to incorporate the Episcopal Church reached into the national level when James Madison, then President of the United States, returned to the House of Representatives a bill to incorporate the Protestant Episcopal Church in Alexandria, on February 21, 1811.[69] It is important enough to cite that Veto Message

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65. 374 U. S. 203, at page 227.

66. Brydon, George M. *Virginia's Mother Church*, Virginia Historical Vol. II, 1947, Appendix, IX, pp. 639 ff.

67. Robertson, D. B., *Should Churches be Taxed?* The Westminster Press, Philadelphia, Pennsylvania, p. 56.

68. Ibid, p. 60.

69. Padover, Saul K. Padover, ed. *The Forging of American Federalism: Selected Writings of James Madison* (Harper Torchbooks, Harper & Row, Publishers, Inc. 1966) p. 307.

1. . . . The bill exceeds the rightful authority to which governments are limited by the essential distinction between civil and religious function.

2. It violates in particular the article of the Constitution of the United States which declares that "Congress shall make no law respecting a religious establishment."

3. The bill enacts into and establishes by law sundry rules and proceedings relative purely to the organization and policy of the church incorporated. . . .

4. Because the bill vests in the said incorporated church an authority to provide for the support of the poor and the education of poor children of the same, an authority which, being altogether superfluous if the provision is to be the result of pious charity, *would be a precedent for giving to religious societies as such a legal agency in carrying into effect a public and civil duty.* (emphasis added).

This was followed by the Virginia State Constitutional Convention of 1829 which did not permit the incorporation of a theological seminary by the state legislature.[70] The currently operative Constitutions of both West Virginia and Virginia still have this restriction "the General Assembly shall not grant a charter of incorporation to any church or religious denomination."[71]

The matter of the seized lands wound up in the United States Supreme Court which voided, as contrary to the principles of natural justice, two Virginia acts which purported to divest the Episcopal Church of title to property 'acquired under the faith of previous law,' in Terret v. Taylor, with even Justice Joseph Story saying, "The Revolution might justly take away the public patronage . . . and the compulsive taxation for the support of the Church.".[72]

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70. Robertson, op. cit. p. 56.

71. Constitution of Virginia, Art. IV, sec. 59; Constitution of West Virginia, Art. VII, Sec. 47.

72. 9 Cr. 43 (1815).

The Virginia State Constitutional Convention, however, had to take one more swipe at the churches and provided that one was not to be permitted to make a bequest in his will to any denomination or to any particular congregation.[73]

Madison wanted his position to be interpreted correctly and on two other occasions he demonstrated what he meant by separation of state and church. In a second veto, while he was President, on February 28, 1811 he returned to the House of Representatives a bill concerning the question of land for a Baptist church in the Mississippi Territory.[74] His Veto Message said,

> "Because the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that "Congress shall make no law respecting an establishment of religion."

Madison further expressed great concern least "Ecclesiastical Bodies" should gain excess possession of property. He feared that power would accompany it and particularly feared that the land would be theirs "in perpetuity"[75] i.e. Mortmain. Therefore, in yet another Memorandum he wrote:[76]

> In the United States there is a double motive for fixing limits in this case, because wealth may increase not only from additional gifts, but from exhorbitant advances in the value of the primitive one. In grants of vacant lands, and of

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73. Robertson, op. cit. p. 56.

74. Hunt, Galliard, ed. The Writings of James Madison, New York, G. P. Putnam's Sons, 1900, Vol. I, p. 40.

75. "Essay on Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments" in Fleet, ed. *Madison's Detached Memoranda*, 3 William and Mary Q. 534 (1946), p. 555.

76. Sonne, Niels H. *Liberal Kentucky*, 1780-1828, University of California Press, 1939, p. 7.

> lands in the vicinity of towns and cities the increase of value is often such as if frozen, would essentially control the liberality confirming them."

In 1823, in a letter to Edward Everett, he wrote further,

> "Prior to the Revolution, the Episcopal Church was established by law in this State. On the Declaration of Independence, it was left with all other sects to self-support."[77]

Madison also added this note to his writings, in obvious disapproval,

> "See also attempt in Kentucky for example, where it was proposed to exempt Houses of Worship from taxes."

and deemed this to be an "encroachment by Ecclesiastical Bodies" inconsistent with constitutional "separation between religion and government."[78]

The disestablishment was so complete that in the early state constitutions there was no constitutional provision for tax exemption of the churches. However, the other side of the coin was that so long as church societies were the recipients of money raised by taxation, there was a strong reason why they should be exempt from it. The churches were small in number, meagre in attendance, and poor. They were granted exemptions from taxation as a matter of course. No need for exemption laws as such were felt, but soon complaints of the exemptions were voiced: in Massachusetts in 1837,[79] in New Hampshire in 1842,[80] and in New Jersey in 1851.[81] The churches as always

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77. IX Writings of James Madison 127 (Hunt ed. 1910).

78. Fleet, ed., op. cit. p. 555.

79. All Saints Parish v. Brookline, 178 Mass. 404.

80. Franklin Street Society v. Manchester, 60 N.H. 342.

81. State v. Jersey City, 24 N. J. Law 108.

made their political power felt and legislatures were persuaded to pass exemption statutes. However, statutes can be declared unconstitutional, and the churches saw that state constitutional provisions only would protect them in their claim to exemptions. Up to 1916, ten states with constitutions adopted between 1780 and 1867 had no provisions for exemption. These were Massachusetts, Constitution of 1780; New Hampshire, Constitution of 1784; Vermont, Constitution of 1793; Connecticut, Constitution of 1818; Maine, Constitution of 1819; Rhode Island, Constitution of 1842; New Jersey, Constitution of 1844; Wisconsin, Constitution of 1848; Iowa, Constitution of 1857 and Maryland, Constitution of 1867.[82] In those states, practices resting on custom or statutes alone gave exemptions. In the remaining thirty eight states, thirteen, by constitutions adopted between 1859 and 1911 either granted exemptions or prohibited the legislatures from taxing, the other twenty five extended to the legislatures the power to pass exemption statutes.[83] We will see that in the present situation, thirty three states have constitutional provisions among which twenty two give exemptions and eleven empower legislatures to give exemptions.[84]

Our nation was not yet fifty years old when the first series of legal challenges came against the exemptions, which resulted in the court cases supra. The claims for the continuance of the exemption were always linked with demands that the nation be recognized as Christian. By 1844 the religious community, with persistence, had been able to influence a candidate for the president of the United States, and James Buchanan on January 18, 1844 introduced into the United States Senate a memorial inspired by Christian theologians demanding that God be recognized, Christ acknowledged as the Saviour, and the

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82. Zollman, Carl, "Tax Exemptions of American Church Property," Michigan Law Review, Vol. XIV, No. 8 (June, 1916) pp. 646-657.

83. Ibid, at page 649.

84. See p. 37 ff.

Bible made the supreme authority in Law.[85] (Buchanan became president in 1856 although he did not win a majority of the popular vote.)

An entire state was soon involved in the issue. In 1850 bills were introduced in both the Senate and the House of Representatives in Pennsylvania "to repeal laws exempting certain property from taxation." The Commissioners of the County of Philadelphia ordered a Memorial to be prepared by Elihu D. Tarr on the "Subject of the Laws Exempting Certain Property from Taxation" and this was presented to the state legislature on December 4, 1850.[86]

Pennslyvania was the first state to adopt a constitutional amendment specifically exempting church property. The vested interest pressuring for this is immediately apparent. Even Virginia gave in. Pennsylvania's had come in 1835,[87] Massachusetts in 1836, Virginia in 1841, New Hampshire in 1842.[88]

The struggle became apparently one of re-establishment. Without the recognition that Christianity was the major force in the nation there could not be a call for indirect subsidy of tax exemption and we find every facet of the fight with the two ideas inseparably linked. The idea of a "Christian Amendment" took hold during the Civil War period when our nation was perceived to be "in trouble" because of its "Godless Constitution." The Committee on the Judiciary of the House of Representatives, on February 18, 1874,[89] with Mr. Benjamin F. Butler reporting to the Congress stated that the framers of the Constitution had seen fit not to do this and the determination of the founding fathers should be sustained. The specific

85. O'Hair, Madalyn Murray, "The U.S. Congress and The Religionists," Society of Separationists, Inc., Austin, Texas. 1969.

86. Robertson, op. cit., p. 66.

87. Ibid, p. 67.

88. Zollman, op. cit. p. 649.

89. Report No. 143, 43rd Congress, 1st Session.

proposal was to amend the Preamble of the Constitution in this wise: (proposed additions italicized)

> "We, the people of the United States in order to *acknowledge Almighty God as the source of all authority and power in civil government, the Lord Jesus Christ as the Ruler among the nations, and His will, revealed in the Holy Scriptures, as the Supreme authority, in order to constitute a Christian government* form a more perfect union, establish justice, insure domestic tranquility, etc."

Supreme Court Justice William Strong was a leading figure in this movement.[90]

A Francis E. Abbot became the leader of the opposition and alternately proposed a change to the First Amendment of the Constitution:[91]

> Section 1. Neither Congress nor any state shall make any law ... granting any special privilege, immunity, or advantage to any sect or religious body or to any number of sects or religious bodies; or taxing the people of any state, either directly or indirectly for the support of any sect or religious body.
>
> Section 2. No person shall ever by any state be required by law to contribute directly or indirectly to the support of any religious society or body of which he or she is not a voluntary member.

On a state level, the "First Demand" was that "churches and other ecclesiastical property shall be no longer exempt from taxation."[92] The argument endured on both a federal and state level for many years. Once again, Pennsylvania was involved in the Constitutional Convention of 1873 with an extended and

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90. Robertson, op. cit., p. 72.

91. The Index, Vol. VII, No. 344, (July 27, 1876) p. 356. See also Robertson, op. cit., p. 74.

92. The Index, Vol. VII, No. 315 (Jan. 6, 1876) p. 7.

heated debate over church property exemption.[93] Indeed a year by year accounting is warranted

1863 forward, Missouri had taxed church property, including cemetaries from 1863 to 1876.[94]

1873 The Episcopal Committee of New York reported that a strong movement was on foot in Wisconsin to tax church property.[95]

1874. A movement developed in Massachusetts to withdraw tax exemptions.[96] The Illinois Methodist Conference Committee recommended the taxation of church property and gave ten reasons for this.[97] In the State of Iowa, Senator John Shane introduced a bill providing for the taxation of church property.[98] President James A. Garfield in a speech in Congress on June 22, 1874 said:

> "The divorce between Church and State ought to be absolute. It ought to be so absolute that no Church property anywhere, in any state, or in the nation, should be exempt from equal taxation; for if you exempt the property of any church organization, to that extent you impose a tax upon the whole community."[99]

1875 James G. Blaine, of Maine, leader in the House of Representatives on December 13, 1875 proposed the Blaine-

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93. Pennsylvania Constitutional Convention, 1873, Debates, State Printing Office, Philadelphia), p. 94.

94. White, Philo, "Laws and Usages, in All the States, in Relation to the Taxing of Churches," *The Journal of the 7th Annual Convention of the Protestant Episcopal Church*, pp. 8-9, see Robertson, op. cit. p. 78.

95. Ibid.

96. Robertson, op. cit. p. 114.

97. The Index, Jan. 11, 1875, p. 63.

98. Brindley, John E., *History of Taxation in Iowa*, State Historical Society of Iowa, 1911, Ch. 12.

99. O'Hair, Madalyn Murray, "Let Us Prey," Society of Separationists, Inc., Austin, Texas, 1967.

Grant (16th) Amendment to the Constitution of the United States. In its features stood out the proposal that "no money raised by taxation in any state for the support of public schools ... shall ever be under the control of any religious sects or denominations. The bill was passed by the House the necessary two thirds vote (180-98).[100] It was defeated in the Senate because of the inclusion of a phrase "it shall not have the effect to impair the rights of property already vested."[101] (First vote: 27 yes, 15 no, 29 absent; second vote: 28 yes, 16 no, 27 absent.)

1876 The Massachusetts House of Representatives debated and voted on a bill (March 31, 1876) which would have required the taxation of all church property over $12,000 value. The vote was 64 for and 116 against the bill.[102] The Republican Party platform recommended an amendment prohibiting public funds from use by sectarian institutions and schools.[103] Every state from 1876 forward admitted to the union was compelled by Congress to write into its constitution a requirement that it maintain a school system "free from sectarian controls."[104] President Ulysses S. Grant gave a speech at Des Moines, Iowa on September 19, 1876 in which he proclaimed that the nation should "leave the matter of religion to the family altar, the Church, and the private school, supported entirely by private contributions."[105] On December 7, 1876 he presented a mandate to Congress with two congruent amendments to the United States Constitution, first to provide for a system of public schools across the land, and that no public monies should ever be used to support any religious or sectarian school. The second amendment was a proposal to tax church property, in

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100. Congressional Record, House, Aug. 4, 1876, p. 5190.

101. Congressional Record, Senate, 4, Part 6, Aug. 11, 1876, p. 5453.

102. Robertson, op. cit. p. 75.

103. Ibid, p. 84.

104. Stokes, Anson Phelps and Pfeffer, Leo, Church and State in the United States, New York, Harper & Row, 1964, p. 435.

105. O'Hair, op. cit. p. 42.

order to correct "an evil" existing which was "the accumulation of the vast amount of untaxed church property" then existing in America.[106] William Lloyd Garrison entered the fray this year stating that the state had no right "to exempt church property from taxation."[107] And Elizabeth Cady Stanton, introduced the argument into the Woman Suffrage campaign with the statement that,[108]

> "If all those magnificent cathedrals with their valuable lands in Boston, Philadelphia and New York were taxed as they should be, the taxes of women who hold property would be proportionately lightened. . . . I cannot see any good reason why wealthy churches and a certain amount of property of the clergy should be exempt from taxation, while every poor widow in the land, struggling to feed, clothe, and educate a family of children, must be taxed on the narrow lot and humble home."

1877 On July 15th of 1877 the United States Senate debated the issue of tax exemption for churches in the District. Although strong opposition to the exemptions was offered the opposition was not successful.[109]

1880 The Republican Party platform again in 1880 recommended an amendment prohibiting public funds from use for sectarian institutions and schools.[110]

1890 The Kentucky State Constitutional Convention of 1890 held a vigorous and extended debate on the question.[111]

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106. Robertson, op. cit. p. 79.

107. The Index, July 13, 1876, p. 327.

108. Stanton, Elizabeth C., The Index, Vol. VII, No. 364, Dec. 14, 1876, p. 595.

109. "Real Property Exempt from Taxation in the District of Columbia," Hearings Before the Committee on the District of Columbia, United States Senate, 77th Congress, 2d Session, U.S. Government Printing Office, 1942, p. 170.

110. Robertson, op. cit. p. 84.

111. Ibid, p. 78.

1896 The plea to have the "Christian Amendment" was again brought forth and introduced into Congress. On March 11th the Committee on the Judiciary gave it a hearing, and the idea was abandoned once more. This effort was reintroduced into the 60th and the 61st Congress,[112] and by

1910 there had been sixty nine religious measures of this nature introduced into the Congress of the United States.[113]

At the time that the New York Evening Post was edited by William Cullen Bryant it spoke editorially to this subject:[114]

> "The Evening Post has long been of the opinion that the American theory of a self-supporting church ought to be carried out to its full and legitimate conclusion, and that the separation of church and state ought to be complete. It should include the total discontinuance of contributions of public money, direct or indirect, to the support of any religious establishment. We have never been able to see the slightest difference in principle between the appropriation of a certain sum of money raised by tax to a particular church, and a release of that church from tax on its property to the same amount. The cost of the act in either case falls upon the taxpayers generally.

1915 the Committee on Taxation at the New York Constitutional Convention in June, 1915 had a number of persons including clergy appear in favor of abolishing the exemptions from taxation enjoyed by the church.[115]

Most recently complaints through the court systems have been undertaken and the three of them have been appealed to

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112. O'Hair, Madalyn Murray, "The United States Congress and the Religionists," Society of Separationists, Inc., 1969.

113. Ibid.

114. O'Hair, Madalyn Murray, "An Earlier Effort to Tax The Church," Society of Separationists, Inc. 1969.

115. Morton, James F. Jr., *Exempting the Churches*, The Truth Seeker Company, New York, 1916, p. 40.

the Supreme Court in very recent years, Lundberg v. County of Alameda (California) 1956,[116] General Finance Corp. v. Archetto (Rhode Island) 1961,[117] Murray v. Comptroller of the Treasury (Maryland) 1966.[118] The fourth case on such appeal is this case.

Why all this trouble? Just how much money is involved?

The church takes literally the Biblical admonition "Let not thy left hand know what thy right hand doeth.".[119] There are no statistics available on church wealth. Not even the government of the United States can make an educated guess. There are no real dependable historical records. Churches are required to report to no one concerning their finances, even their own constituents. The national census of 1850 took some account of church property and about that time the Commissioners of the County of Philadelphia had a *Memorial* prepared in respect to tax records of that city.[120] In 1912 H. K. Carroll, LL.D., who had been in charge of the department of churches in the census of 1890 wrote a book *Religious Forces in the United States,* using the figures available from the prior census studies of the federal government. Wm. E. Hannon, Legislative Reference Librarian of the New York State Library did a study on the *Property Exempt from Taxation in the Forty Eight States.*[121] The Chamber of Commerce of White Plains, Westchester County, New York, completed a study of that county in 1919 and 1920.[122] Edith MacFadden of Massachusetts with informa-

116. 46 Cal. 2d 644, app. dismd. 352 U. S. 921.

117. 93 R. I. 392, app. dismd. 369 U. S. 423.

118. 241 Md. 383, Cert. den. 385 U. S. 865.

119. Matthew 6:3.

120. Robertson, op. cit. p. 67.

121. Hannan, William E. Property Exempt from Taxation in the Forty-eight States, Legislation Bulletin 42, University of the State of New York, 1917.

122. Tax Exemptions on Real Estate, an Increasing Menace, White Plains, New York, Westchester Chamber of Commerce, 1922.

tion provided by local assessors and offices of Tax Commissioners attempted a study in 1925.[123] In 1934 another study was attempted in New York State, by Tobin, Hannan and Tolman.[124] However, frequently the religious property was not adequately identified. Now, taking only the property which was clearly distinguished as of a religious nature, we can make a small table of estimate. There is some aid in that the Federal law of 1850 prescribing the nature of census-taking for 1850, 1860 and 1870 prescribed for the first time that 'social statistics' be taken and among the subjects was 'religious organizations' so that from each denomination the government asked for meaningful figures in relationship to 'number of churches, church accommodations and the value of church property.'[125]

Using all of these sources we have then, this result:

	Total value of reported church property.
1850	$83,000,000[126]
1860	165,000,000[127]
1870	354,483,587[128]
1880	
1890	679,694,439[129]
1906	1,257,575,867[130]

123. MacFadden, Edith, *The Next Question*, see Robertson, op. cit. p. 144.

124. The Exemption from Taxation of Privately Owned Real Property Used for Religious, Charitable, and Educational Purposes in New York State.

125. Robertson, op. cit., p. 147.

126. Ulysses S. Grant, President of the United States, in 1875, published this estimate, December 7, 1875 to the Congress of the United States.

127. Morton, op. cit. p. 76.

128. Ibid; U. S. Census, 1870, I, page 506.

129. Morton, op. cit. p. 76.

130. Bureau of Census, Special Reports, Religious Bodies, 1906, Vol. I, p. 21.

1916 . . . . . 1,676,600,580[131]
1926 . . . . . 3,839,500,610[132]
1936 . . 3,411,875,467 at depreciated depression rates.[133]

Within these figures we have a smattering of other knowledge. In New York State the amount of church property

1890 . . . . . $140,123,008[134]
1906 . . . . . 255,166,284[135]
1936 . . . . . 564,078,000[136]

In New York City, the amount of church property

1890 . . . . . 73,352,437[137]
1914 . . . . . 170,445,725[138]

In four decades explicit amounts as to denominations are available.

1906:	Roman Catholics	$292,638,502[139]
	Protestants	935,942,578
	All others	28,994,502
1916	Roman Catholics	374,206,895[140]

131. Bureau of Census, Special Reports, Religious Bodies, 1916, Vol. I, p. 12.

132. Bureau of Census, Special Reports, Religious Bodies, 1926, Vol. I, p. 3.

133. Bureau of Census, Special Reports, Religious Bodies, 1936, Vol. I, p. 4.

134. Morton, op. cit. p. 78.

135. Ibid.

136. Robertson, op. cit. p. 146.

137. Morton, op. cit. p. 78.

138. Ibid.

139. Bureau of Census, Special Reports, Religious Bodies, 1906, Vol. I, p. 21.

140. Bureau of Census, Special Reports, Religious Bodies, 1916, Vol. I, p. 12.

	Methodist Episcopal .	215,102,014
	Episcopal	154,990,150
	Presbyterian	150,239,123
	Baptists	94,644,133
1926	Roman Catholics	837,271,053[141]
	Methodist Episcopal .	406,165,659
	Presbyterian	338,152,743
	Episcopalian	314,596,738
1936 at depreciated depression values.	Roman Catholic	787,001,357[142]
	Methodist Episcopal .	345,402,555
	Presbyterian	270,464,345
	Episcopalian	266,400,447

The only estimate that can be given then is that at 1926 the property held by the church was about four billion dollars. Just forty years later three estimates have been made, one by United Press International from material gathered from and by the Wall Street Journal,[143] the Columbia Broadcasting System for a network special on church wealth[144] and Dr. Martin Larson.[145]

Dr. Larson's estimate, based on studies of tax records, assessment records, and land studies, is that the churches today own 79.5 billion dollars worth of real estate.[146] C.B.S. accepts a figure of $80 billion.[147] UPI estimate is at $100 billion.[148] It needs to be pointed out here that the total assets of cash, real

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141. Bureau of Census, Special Reports, Religious Bodies, 1926, Vol. I, p. 3.

142. Bureau of Census, Special Reports, Religious Bodies, 1936, Vol. I, p. 4.

143. Robert J. Regan for United Press International, in August, 1967.

144. C.B.S. Reports, "The Business of Religion," as broadcast over the CBS Television Network, June 18, 1968.

145. Larson, Martin A., Church Wealth and Business Income, Philosophical Library, New York, 1965.

146. Ibid, p. 47.

147. CBS Reports, op. cit.

148. Robertson, op. cit. p. 167.

estate, inventories of the five largest American corporations in their 1964 reports were as follows:[149]

Standard Oil of New Jersey	$12.0 billion
General Motors	10.8
Ford Motor	5.9
United States Steel	5.1
Socony Mobil Oil	4.7
	$48.5 billion

as compared to the real estate holdings alone of churches having $79.5 billion.

Of this, the distribution of property now appears to be[150]

Roman Catholic	$44.5 billion
Protestant	28.
Jewish	7.0
	$79.5 billion

It appears to be superfluous to point out that the Roman Catholic Church rivals the holdings of the five largest American corporations. Roman Catholics constitute 24% of the population by exaggerated claim.

Percentage populations of major religious groupings, *claimed.*

Protestant	36 %
Roman Catholic	24 %
Jews	2.7%
Persons who have never been to churches, never joined any churches	37 %
Persons profession no religion	2.7%*

*included in above four figures, as both church and non-church persons.

The United States government has been able to keep one record of church matters, recorded in the Statistical Abstract of

149. Olson, Carl, Tax Exemptions of Churches and Churchmen in the United States, Masters Thesis, School of Journalism, Columbia University, May, 1968, p. 27.

150. Larson, op. cit. p. 47.

the United States, and this is the amount of *new* church construction.[151]

Church construction–NEW, in years reported.

1950	$ 409,000,000	1963	$1,001,000,000
1955	734,000,000	1964	992,000,000
1960	1,013,000,000	1965	1,207,000,000
1961	1,003,000,000	1966	1,164,000,000
1962	1,033,000,000	1967	1,093,000,000

We turn now to see what property is exempt, under what legal rules, and what the status is today, on a state level. We must first recall that the Federal government had placed prohibitions by the First Amendment but that the states were not immediately bound by this. However, during the period after the formation of the federal government dis-establishment proceeded in most states before the religious community could muster itself in the legal and political arena to retain its prestigious position by other approaches than the coercive use of state power on citizens. In 1868, after the Civil War, the Fourteenth Amendment was added to the Constitution of the United States, and from the debates in respect to this there came the interpretation that transformed the Federal policy of separation to a state policy. Mr. Justice Roberts in Cantwell v. Connecticut noted officially that the First Amendment in effect "rendered the legislatures of the states as incompetent as Congress to enact such laws (respecting an establishment of religion)."[152] Since that time it has been left to the Supreme Court to develop the meaning of the prohibition.

At the state level religion could and did exert more influence. Although the most recent statutes and constitutional provisions were forced through by religious political pressures, a review of the provisions of both reveal with what misgivings and with what restrictions and reservations the exemptions were granted.

151. Lerner, op. cit. p. 693.

152. 310 U. S. 396 (1940).

The churches were expected to be small, poor, devoted solely to religious ends, and to remain that way. God's little acre was indeed regarded as being a very small lot.

One of the most curious facets of the entire business of tax exemption for the church is that, actually, such exemption is forbidden by very explicit terms in the constitutions of forty four states in America,[153] as follows: *Alabama*, ". . . no one shall be compelled by law . . : to pay any . . . taxes . . . for maintaining any minister or ministry . . .". – *Alaska* "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.". *Arizona*, bars taxes or public funds "in aid of any church . . .". *Arkansas* ". . . no man can, of right, be compelled to . . . support any place of worship . . .". *California*, prohibits public funds "or anything" to be given to or in aid of any religious sect, church. *Colorado*, "No persons shall be required to . . . support any ministry or place of worship, religious sect or denomination . . ."; this state also forbids the use of public funds to help any church or sectarian society, forbids grant by the State of money to any church, or

153. Constitutional references as follows: Alabama, Art. I, sec. 2, (Declaration of Rights); Alaska, Art. I, sec. 4 (Declaration of Rights); Arizona, Art. 9, sec. 10; California, Art. 4, sec. 30; Colorado, Art. II, sec. 4; Connecticut, Article Seventh, sec. 1; Delaware, Art. I, Sec. 1; Florida, Art. 6 (Declaration of Rights); Georgia, 2-114; Hawaii, Art. I, sec. 3; and Art. VI, sec. 6; Idaho, Art. 1, sec. 4 and Art. 9, sec. 5; Illinois, Art. II, sec. 3; Indiana, Art. 1, sec. 6; Iowa, Art. 1, sec. 3; Kansas, (Bill of Rights), sec. 7; Kentucky, (Bill of Rights), sec. 5; Louisiana, Art. 4, Sec. 8; Maine, no reference; Maryland, Art. 36; Massachusetts, Art. 18, Sec. 2; Michigan, Art. II, sec. 3; Minnesota, (Bill of Rights), Art. I, sec. 16; Mississippi, Art. 4, sec. 66; Missouri, Art. 1, sec. 7; Montana, Art. III, sec. 4 and Art. XI, sec. 8; Nebraska, (Bill of Rights), Art. I, sec. 4; Nevada, Art. 11, sec. 10; New Hampshire, Part I, Art. 6th; New Jersey, Art. I, sec. 4; New Mexico, Art. VII, sec. 3; New York, no reference; North Carolina, no reference; North Dakota, no reference; Ohio, (Bill of Rights), Art. I, sec. 7; Oklahoma, Art. 1, Sec. 5; Oregon, Art. I, sec. 5; Pennsylvania, Art. I, sec. 4; Rhode Island, Art. I, sec. 3; South Carolina, Art. I, sec. 4; South Dakota, Art. VI, sec. 3; Tennessee, Art. I, sec. 3; Texas, Art. 1, sec. 7; Utah, Art. I, sec. 4; Vermont, Art. Ch. I, art. 3rd; Virginia, Art. VI, sec. 58; Washington, Art. 1, sec. 12; West Virginia, Art. III, sec. 15; Wyoming, Art. 1, sec. 19.

for any sectarian purpose. *Connecticut,* ". . , no person shall by law be compelled to . . . support . . . any congregation, church, or religious association.". *Delaware,* ". . . no man shall or ought to be compelled to . . . contribute to the erection or support of any place of worship, or to the maintenance of any ministry . . ." *Florida,* bars public funds to aid any church or sect. *Georgia,* forbids public money to aid churches or 'any sectarian institution.' *Hawaii* "No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof . . ." This state also prohibits the use of public funds for the establishment of religion. *Idaho,* "No person shall be required to . . . support any ministry or place of worship, religious sect or denomination . . ." *Illinois,* No person shall be required to . . . support any ministry or place of worship . . .". *Indiana,* prohibits public money to be used for the support of religious institutions. *Iowa,* ". . . nor shall any person be compelled to . . . pay . . . taxes for building or repairing places of worship, or the maintenance of any minister, or ministry." *Kansas,* ". . . nor shall any person be compelled to . . . support . . . any form of worship." *Kentucky,* ". . . nor shall any person be compelled to . . . contribute to the erection or maintenance of any such place (i.e. place of worship) or to the salary or support of any minister of religion.". *Louisiana,* "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, minister or teacher thereof, as such.", *Maine* no reference. *Maryland,* ". . . nor ought any person be compelled to contribute . . . to maintain, any place of worship . . ." *Massachusetts,* "and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. *Michigan,* "No person shall be compelled . . . to contribute to the erection or support of any place of religious worship, or to pay . . . taxes . . . for the support of any minister of the gospel . . .". *Minnesota,* ". . . nor shall any man be compelled to . . . support any place of worship, or to maintain any religious or ecclesiasti-

cal ministry, . . .". *Mississippi*, forbids grant or donation or gratuity "for a sectarian purpose or use,". *Missouri*, bars state funds to aid any church or sect. *Montana*, "No person shall be required to . . . support any ministry." *Nebraska*, "No person shall be compelled . . . to support any place of worship." *Nevada* bars public funds 'for sectarian purpose.' *New Hampshire* has a very peculiar permissive clause which reads as follows: "As morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and as the knowledge of these is most likely to be propagated through a society, by the institution of the public worship of the Deity, and of public instruction in morality and religion; therefrom, to promote these important purposes, the people of this state have a right to empower and do hereby fully empower, the legislature, to authorize, from time to time, the several towns, parishes, bodies corporate, or religious societies, within this state, to make adequate provision, at their own expense, for the support and maintenance of public Protestant teachers of piety, religion, and morality . . ." *New Jersey*, "There shall be no establishment of one religious sect in preference to another. *New Mexico*, "No person shall be required to . . . support any religious sect or denomination." *New York*, no reference, *North Carolina*, no reference. *North Dakota*, no reference. *Ohio*, "No person shall be compelled to . . . support any place of worship . . ." *Oklahoma*, No public money or property shall ever be appropriated, applied, donated, or used directly or indirectly, for the use, benefit, or support of any sect, church, denomination or system of religion or the use, benefit or support of any priest, preacher, minister, or other religious teacher or dignitary or sectarian institution as such. *Oregon*, bars appropriations of public funds "for the benefit of any religious, or theological institution." *Pennsylvania*, ". . . no man can of right be compelled to . . . support any place of worship, or to maintain any ministry . . ." *Rhode Island*, "no man shall be compelled to

. . . support any place of worship, or to maintain any ministry . . .". *South Carolina,* The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. *South Dakota,* No person shall be compelled to support any ministry or place of worship . . . No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution. *Tennessee,* ". . . no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent." *Texas,* "No money shall be appropriated or drawn from the treasury for the benefit of any sect or religious society, theological or religious seminary; nor shall property belonging to the state be appropriated for such purposes.". *Utah,* "There shall be no union of Church and State, nor shall any church dominate the State or interfere." with its functions. *Vermont,* "no man ought to, or of right can be compelled to . . . support any place of worship . . .". *Virginia,* "No man shall be compelled to . . . support any religious worship . . . And the General Assembly shall not . . . pass any law . . . or the people of any district within this State, to levy on themselves or others any tax for the erection or repair of any house of public worship, or for the support of any church . . .". *Washington,* "No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction, or the support of any religious establishment. *West Virginia,* "No man shall be compelled to . . . support any religious worship, place or ministry whatsoever . . .". *Wisconsin,* ". . . nor shall any man be compelled to . . . erect or support any place of worship, or to maintain any ministry . . . nor shall any money be drawn from the treasury for the benefit of religion, societies of religion or theological seminaries." *Wyoming,* bars state money for aid of any sectarian or religious society or institution.

Thirty three states have constitutional provisions concerned with tax exemptions to religion. Forty nine states have statutes, codes, general laws, or tax laws concerned with the subject specifically.

We need to look carefully at the stipulations, and examine first the constitutions, as to what they do, what is involved, and to whom the exemption goes.

First the diverse states exempt from taxation,[154] permits exemption from taxation,[155] gives real property tax exemption,[156] exempts from state and local taxes and inheritance taxes,[157] empowers the legislature to exempt from taxation,[158] requires the legislature to exempt from taxation,[159] permits the legislature to exempt from taxation,[160] authorizes the legislature to exempt from taxation,[161] directs that exemptions from taxation may be granted only by general laws,[162] states that the General Assembly may exempt,[163] or the legislature by general law may exempt.[164]

In addition, one state notes specifically that the exempting section does not apply to special assessments[165] and one state adds that "where such property, prior to acquisition by exempt

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154. *Alabama*, Art. 4, sec. 91; *Alaska*, Art. IX, sec. 4; *Arkansas*, Art. 16, sec. 5; *California*, Art. 13, sec. 1½; *Colorado*, Art. X, sec. 5; *Delaware*, Art. 10, sec. 3; *Kansas*, Art. 11, sec. 1; *Kentucky*, Art. 170; *Louisiana*, Art. 10, sec. 4; *Minnesota*, Art. 9, sec. 1; *Montana*, Art. XII, sec. 2; *New Mexico*, Art. VIII, sec. 3; *North Dakota*, Sec. 176; *Oklahoma*, Art. 10, sec. 6; *South Carolina*, Art. 10, sec. 4; *Utah*, Art. XIII, sec. 2; *Virginia*, Sec. 183; *Wyoming*, Art. 15, sec. 12.

155. *Arizona*, Art. 9, sec. 2.

156. *Alabama*, Art. 4, Sec. 91; *California*, Art. 13, sec. 1½.

157. *Virginia*, Sec. 183.

158. *Florida*, Art. 9, sec. 1; *Illinois*, Art. IX, sec. 3; *Indiana*, Art. 10, sec. 1; *Missouri*, Art. 10, sec. 6; *Ohio*, Art. XII, sec. 2; *Pennslyvania*, Art. 9, sec. 1; *Tennessee*, Art. 2, sec. 28; *Texas*, Art. 8, sec. 2.

159. *South Dakota*, Art. XI, sec. 6.

160. *South Carolina*, Art. 10, sec. 1.

161. *California*, Art. 13, sec. 1½, *Georgia*, Art. VII, par. IV (2-5404); *West Virginia*, Art. X, sec. 1.

162. *New Jersey*, Art. 8, sec. 1, par 2; *New York*, Art. 16, sec. 1.

163. *North Carolina*, Art. V, sec. 5.

164. *Nebraska*, Art. VIII, sec. 2.

165. *Utah*, Art. XIII, sec. 2.

organization, was subject to a tax lien, it shall continue so subject."[166]

What is exempt? It is property,[167] all property,[168] all, or any portion of, property,[169] real and personal property,[170] all property, real and personal,[171] all real and personal property,[172] all real property and equipment,[173] all church property,[174] all churches, church property and houses of worship,[175] churches used as such,[176] places of religious worship,[177] actual places of religious worship,[178] actual places of worship . . . in no event more than one acre,[179] houses,[180] lots with the building thereon,[181] lots and buildings thereon . . . limited to one acre in cities or towns and five acres outside thereof,[182] places . . . with the grounds attached thereto and . . . appurtenant to the house of worship . . . not exceeding

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166. *New Mexico*, Art. VIII, sec. 3.

167. *Arizona*, Art. 9, sec. 2; *Florida*, Art. 9, sec. 1; *Illinois*, Art. IX, sec. 3; *Indiana*, Art. 10, sec. 1; *Louisiana*, Art. 10, sec. 4; *Montana*, Art. XII, sec. 2; *Nebraska*, Art. VIII, sec. 2; *North Carolina*, Art. V, sec. 5; *South Carolina*, Art. 10, sec. 1; *Virginia*, Sec. 183; *West Virginia*, Art. X, sec. 1.

168. *Georgia*, Art. VII, par. IV (2-5404); *Kansas*, Art. 11, sec. 1; *New Mexico*, Art. VIII, sec. 3; *North Dakota*, Sec. 176; *Oklahoma*, Art. 10, sec. 6; *South Dakota*, Art. XI, sec. 6; *Tennessee*, Art. 2, sec. 28.

169. *Alaska*, Art. IX, sec. 4; *California*, Art. 13, sec. 1c.

170. *New Jersey*, Art. 8, sec. 1, par. 2.

171. *Colorado*, Art. X, sec. 5; *Missouri*, Art. 10, sec. 6.

172. *Delaware*, Art. 10, sec. 3.

173. *California*, Art. 13, sec. 1½.

174. *New Mexico*, Art. VIII, sec. 3.

175. *Minnesota*, Art. 9, sec. 1.

176. *Arkansas*, Art. 16, sec. 5.

177. *Georgia*, Art. VII, par. IV; *Louisiana*, Art. 10, sec. 4.

178. *Pennsylvania*, Art. 9, sec. 1.

179. *Texas*, Art. 8, sec. 2.

180. *Ohio*, Art. XH, sec. 2.

181. *Utah*, Art. XIII, sec. 2.

182. *Alabama*, Art. 4, sec. 91; *Wyoming*, Art. 15, sec. 12.

one-half acre in cities or towns and not exceeding two acres in the country,[183] buildings and premises actually occupied by said structures,[184] buildings with the land they actually occupy, and the furniture and furnishings therein . . . together with the additional adjacent land reasonably necessary for the convenient use of any such building,[185] church parsonages,[186] parsonages,[187] all parsonages or residences, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto,[188] any property used as a dwelling place, in no event more than one acre,[189] rectaries,[190] church schools.[191]

Under what conditions is the property exempt? If it is used for,[192] used only for,[193] used exclusively for,[194] used solely for,[195] used solely and exclusively for,[196] wholly and exclu-

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183. *Kentucky*, Art. 170.

184. *South Carolina*, Art. 10, sec. 4.

185. *Virginia*, Sec. 183.

186. *Wyoming*, Art. 15, sec. 12.

187. *Louisiana*, Art. 10, sec. 4.

188. *Kentucky*, Art. 170.

189. *Texas*, Art. 8, sec. 2.

190. *Louisiana*, Art. 10, sec. 4.

191. *Wyoming*, Art. 15, sec. 12.

192. *Delaware*, Art. 10, sec. 3; *Florida*, Art. 9, sec. 1; *Illinois*, Art. IX, sec. 3; *Indiana*, Art. 10, sec. 1; *Kentucky*, Art. 170; *Louisiana*, Art. 10, sec. 4; *Montana*, Art. XII, sec. 2; *New Mexico*, Art. VIII, sec. 3; *South Carolina*, Art. 10, sec. 1; *Tennessee*, Art. 2, sec. 28; *West Virginia*, Art. X, sec. 1.

193. *Georgia*, Art. VII, par. IV (2-5404).

194. *Alabama*, Art. 4, sec. 91; *Alaska*, Art. IX, sec. 4; *Arkansas*, Art. 16, sec. 5; *Kansas*, Art. 11, sec. 1; *Missouri*, Art. 10, sec. 6; *Nebraska*, Art. VIII, sec. 2; *New Jersey*, Art. 8, sec. 1, par. 2; *New York*, Art. 16, sec. 1; *Ohio*, Art. XII, sec. 2; *North Dakota*, Sec. 176; *Oklahoma*, Art. 10, sec. 6; *Texas*, Art. 8, sec. 2; *Utah*, Art. XIII, sec. 2; *Wyoming*, Art. 15, sec. 12.

195. *California*, Art. 13, sec. 1½; Art. 13, sec. 1c; *South Dakota*, Art. XI, sec. 6.

196. *Colorado*, Art. X, sec. 5.

sively used for,[197] occupied as.[198]

What about ownership? It must be lawfully owned and held by,[199] owned by,[200] held for,[201] belonging to.[202]

What is the specific use indicated? Public worship,[203] religious worship,[204] actual religious worship,[205] religious purposes,[206] (churches) used as such,[207] only for residential purposes,[208] as a dwelling place for the ministry,[209] occupied as a home,[210] used as places of residence,[211] for the residence of the minister.[212]

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197. *Virginia*, Sec. 183.

198. *Kentucky*, Art. 170.

199. *Virginia*, Sec. 183.

200. *California*, Art. 13, sec. 1c; *Georgia*, Art. VII, par. IV (2-5405); *Kentucky*, Art. 170; *Nebraska*, Art. VIII, sec. 2; *New Jersey*, Art. 8, sec. 1, par. 2; *New York*, Art. 16, sec. 1.

201. *North Carolina*, Art. V, sec. 5; *Tennessee*, Art. 2, sec. 28.

202. *Louisiana*, Art. 10, sec. 4.

203. *Ohio*, Art. XII, sec. 2.

204. *Alabama*, Art. 4, Sec. 91; *Colorado*, Art. X, sec. 5; *Kentucky*, Art. 170; *Louisiana*, Art. 10, sec. 4; *Missouri*, Art. 10, sec. 6; *Pennsylvania*, Art. 9, sec. 1; *Utah*, Art. XIII, sec. 2; *Virginia*, Sec. 183; *Wyoming*, Art. 15, sec. 12.

205. *Montana*, Art. XII, sec. 2.

206. *Alaska*, Art. IX, sec. 4; *California*, Art. 13, sec. 1½; Art. 13, sec. 1c; *Florida*, Art. 9, sec. 1; *Illinois*, Art. IX, sec. 3; *Indiana*, Art. 10, sec. 1; *Kansas*, Art. 11, sec. 1; *Nebraska*, Art. VIII, sec. 2; *New Jersey*, Art. 8, sec. 1, par. 2; *New York*, Art. 16, sec. 1; *North Carolina*, Art. V, sec. 5; *North Dakota*, sec. 176; *Oklahoma*, Art. 10, sec. 6; *South Carolina*, Art. 10, sec. 1; *South Dakota*, Art. XI, sec. 6; *Tennessee*, Art. 2, sec. 28; *West Virginia*, Art. X, sec. 1.

207. *Arkansas*, Art. 16, sec. 5.

208. *Georgia*, Art. VII, par. IV.

209. *Texas*, Art. 8, sec. 2.

210. *Kentucky*, Art. 170.

211. *Louisiana*, Art. 10, sec. 4.

212. *Virginia*, Sec. 183.

What entities may use or own, as above? A church,[213] churches,[214] religious denominations,[215] religious groups,[216] religious bodies,[217] religious associations,[218] religious organizations,[219] religious societies,[220] strictly religious society,[221] any religious society,[222] any corporation or association organized or conducted exclusively for . . . religious purposes.[223]

What special provisions are there in relationship to the use or ownership, as above? It must be non-profit,[224] from which no income is derived,[225] yielding no revenue to the church,[226] not operating for profit,[227] not conducted for profit,[228] not used or held for profit,[229] not held for profit,[230] not owned or used for financial gain or profit to either the owner or user,[231] not conducted for profit and no part of whose net earnings inures

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213. *Texas*, Art. 8, sec. 2.

214. *Virginia*, Sect. 183.

215. *Louisiana*, Art. 10, Sec. 4.

216. *Arizona*, Art. 9, sec. 2; *California*, Art. 13, sec. 1½; *Georgia*, Art. VII, par. IV (2-5404).

217. *South Dakota*, Art. XI, sec. 6; *Virginia*, Sec. 183.

218. *Arizona*, Art. 9, sec. 2.

219. *Illinois*, Art. IX, sec. 3.

220. *California*, Art. 13, sec. 1c;

221. *Texas*, Art. 8, sec. 2.

222. *Kentucky*, Art. 170.

223. *New Jersey*, Art. 8, sec. 1, par. 2; *New York*, Art. 16, sec. 1.

224. *Alaska*, Art. IX, sec. 4.

225. *Georgia*, Art. VII, par. IV (2-5404).

226. *Texas*, Art. 8, sec. 2.

227. *New Jersey*, Art. 8, sec. 1, par. 2; *New York*, Art. 16, sec. 1.

228. *Virginia*, Sec. 183.

229. *Arizona*, Art. 9, Sec. 2.

230. *Missouri*, Art. 10, sec. 6.

231. *Nebraska*, Art. VIII, sec. 2.

to benefit of any private individual,[232] not leased for profit or income,[233] for no other purpose–.[234]

In each case the property exempted can only be exempted if used by,[235] actually used by,[236] used solely by,[237] occupied by,[238] or belonging to,[239] owned by,[240] owned solely by,[241] in equitable title to,[242] in legal title to,[243] or held by,[244]

Unlike the Federal Constitution, which has in it no reference to a superior religious entity, forty nine state constitutions have respectful deference thereto. The actual language used is 'Almighty God,'[245] 'Creator,'[246] 'God,'[247] 'supreme Ruler of

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232. *California*, Art. 13, sec. 1c.

233. *Louisiana*, Art. 10, sec. 4.

234. *Kentucky*, Art. 170.

235. *Connecticut*, sec. 12-81 (13); *Iowa*, 427.1; *Maine*, 91-A, 10 Subsection G.

236. *Connecticut*, sec. 12-81 (15).

237. *Wisconsin*, 70.11 (1).

238. *New Hampshire*, 72:23.

239. *Idaho*, 63-105B, *North Dakota*, Sec. 57-02-08.

240. *Colorado*, 137-17; *Connecticut*, sec. 12-81 (13); *Illinois*, 120-500.2; *Kansas*, 79-201; *Maine*, 91-a, 10 Subsection G, I; *Michigan*, 7.7; *Nevada*, 361.125; *North Dakota*, Sec. 57-02-08; *New Hampshire*, 77:23; *Texas*, Sec. 7150 (1); *Vermont*, 32-3802 (1).

241. *Wisconsin*, 70.11 (1).

242. *Pennsylvania*, 5453.202 also 5453.204.

243. Ibid.

244. *New York*, Sec. 436.

245. *Alabama*, Preamble to Constitution; *Arizona*, Preamble to Constitution; *Arkansas*, Preamble to Constitution, Art. 2; sec. 24; *California*, Preamble to Constitution; *Delaware*, Art. I, sec. 1; *Idaho*, Preamble to Constitution; *Illinois*, Preamble to Constitution; *Indiana*, Preamble to Constitution, Art. 1, sec. 2; *Kansas*, Preamble to Constitution; *Kentucky*, Preamble to Constitution, Bill of Rights, sec. 1; *Maryland*, Preamble to Declaration of Rights; *Michigan*, Preamble to Constitution; *Mississippi*, Preamble to Constitution; *Missouri*, Bill of Rights, Art. I, sec. 5; *Montana*, Preamble to Constitution; *Nebraska*, Preamble to Constitution, Bill of Rights, Art. I, sec. 4; *Nevada*, Preamble to Constitution; *New Jersey*,

the universe,'[248] 'Supreme Being,'[249] 'great Legislator of the universe,'[250] 'Great Creator and Preserver of the Universe,'[251] Deity,[252]. One state, West Virginia has no such reference at all, in any terms.

Two states specifically note that "religion" is "essential to good government."[253]

Four states claim that it is a duty to worship and each makes this claim in various language: *Connecticut*, "It being the duty of all men to worship the Supreme Being, the Great Creator and

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Preamble to Constitution, Art. I, sec. 3; *New Mexico*, Preamble to Constitution; *New York*, Preamble to Constitution; *North Carolina*, Preamble to Constitution, Art. 1, sec. 26; *North Dakota*, Constitution introduction; *Ohio*, Preamble to Constitution, Bill of Rights, Art. I, sec. 7; *Oklahoma*, Preamble to Constitution; *Oregon*, Bill of Rights, Art. I, sec. 2; *Pennsylvania*, Preamble to Constitution, Art. I, sec. 3; *Rhode Island*, Preamble to Constitution, Art. I, sec. 3; *South Dakota*, Preamble to Constitution; *Tennessee*, Constitution, Art. I, sec. 3; *Texas*, Preamble to Constitution, Art. I, sec. 6; *Utah*, Preamble to Constitution; *Vermont*, Art. Ch. I, art. 3rd; *Wisconsin*, Preamble to Constitution, Art. I, sec. 18.

246. *Alabama*, Declaration of Rights, Art. I, sec. 1; *Delaware*, Preamble to Constitution, Art. 1, sec. 1; *Indiana*, Art. 1, sec. 1; *North Carolina*, Art. 1, sec. 1; *Virginia*, Art. I, sec. 16.

247. *Alaska*, Preamble to Constitution; *Connecticut*, Preamble to Constitution; *Georgia*, Preamble to Constitution, Art. 1, sec. 2-113; *Maryland*, Art. 36, Art. 37; *Massachusetts*, Declaration of Rights, Art. III; *Michigan*, Art. II, sec. 3; *Minnesota*, Preamble to Constitution, Bill of Rights, Art. I, sec. 16; *New Mexico*, Art. II, sec. 11; *Pennsylvania*, Art. I, sec. 4; *South Carolina*, Preamble to Constitution; *South Dakota*, Art. VI, sec. 3; *Vermont*, Ch. I, art. 3rd; *Wyoming*, Preamble to Constitution.

248. *Colorado*, Preamble to Constitution; *Missouri*, Preamble to Constitution; *Washington*, Preamble to Constitution.

249. *Iowa*, Preamble to Constitution; *Massachusetts*, Declaration of Rights, Art. III; *Mississippi*, Art. 14, sec. 265; *South Carolina*, Art. 17, sec. 4; *Texas*, Art. I, sec. 4.

250. *Massachusetts*, Declaration of Rights, Art. II.

251. *New Hampshire*, Pt. I, Art. 6th.

252. *Hawaii*, Preamble to Constitution.

253. *Arkansas*, Art. 2, sec. 25; *Nebraska*, Bill of Rights, Art. I, sec. 4.

Preserver of the Universe, . . ."[254]; *Delaware*, "Although it is the duty of all men frequently to assemble together for the public worship of Almighty God . . ."[255]; *Maryland*, "That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him . . ."[256]; *Massachusetts*, "It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe . . ."[257]257.

One state notes that citizens ought to worship. *Vermont*, "Nevertheless, every sect or denomination of christians ought to observe the sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed word of God."[258] This is one of three references to Christianity.

Special attention should be given to the constitutions of two New England states, for their unusual features: Connecticut has the only other reference to Christianity, "No preference shall be given by law to any Christian sect or mode of worship."[259]. Yet, Connecticut goes further and directly intervenes in the internal working of religion in this wise: "But every person now belonging to such congregation, church or religious association shall remain a member thereof until he shall have separated himself therefrom, in the manner hereinafter provided. And each and every society or denomination of Christians in this state, shall have and enjoy the same and equal powers, rights and privileges: and shall have power and authority to support and maintain the ministers or teachers of their respective denominations, and to build and repair houses for public worship, by a tax on the members of any such society only, to be laid by a

254. Art. Seventh, sec. 1.

255. Art. I, sec. 1.

256. Art. 36.

257. Art. II.

258. Art. Ch. I. Art. 3rd.

259. Art. First, sec. 4.

major vote on the legal voters assembled at any society meeting, warned and held according to law, or in any other manner."[260] "If any person shall choose to separate himself from the society or denomination of Christians to which he may belong, and shall leave a written notice thereof with the clerk of such society, he shall thereupon be no longer liable for any future expenses which may be incurred by said society."[261]

New Hampshire is the only other state taking such leave, "As morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and as the knowledge of these is most likely to be propagated through a society, by the institution of the public worship of the Deity, and of public instruction in morality and religion; therefrom, to promote these important purposes, the people of this state have a right to empower, and do hereby fully empower, the legislature, to authorize, from time to time, the several towns, parishes, bodies corporate, or religious societies, within this state, to make adequate provision, at their own expense, for the support and maintenance of public Protestant teachers of piety, religion, and morality . . . And every denomination of Christians, demeaning themselves quietly, and as good subjects of the state, shall be equally under the protection of the law: And no subordination of any one sect or denomination to another, shall ever be established by law."[262]

> This language can leave no doubt at all that the lands are to be owned by religious entities, used by religious entities and for religious purposes relating to "God"–which appears to be anthropomorphic from the language used and the era in which the insertions were put into the constitutions.

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260. Art. Seventh, sec. 1.

261. Art. Seventh, sec 2.

262. Pt. I, Art. 6th.

Under the statutes, the exempted property is more specifically designated and the intent is even more readily discernible.

Most states' statutes, codes and laws 'exempt from tax(ation),'[263] others exempt from assessment,[264] from ad valorem tax,[265] from real property tax,[266] from real estate taxation,[267] from all property taxation,[268] from general property tax,[269] from real and personal property tax,[270] from general taxation,[271] from all tax,[272] from taxation for state, county or local purposes,[273] from state, county and city taxation,[274] from all county and other local taxes,[275] from city utility tax,[276] from

263. *Arizona*, Revised Statutes, 42-271; *Arkansas*, Statutes, 84-206; *California*, West's Annotated Codes, Revenue and Taxation Code, Sec. 214; *Connecticut*, General Statutes, Sec. 12-81 (12); *Florida*, Statutes, Sec. 192.06; *Idaho*, Code, 63-105B; *Illinois*, Smith-Hurd Annotated Statutes, 120-500.2; *Indiana*, Burns Statutes, 64-201; *Iowa*, Code, 427.1; *Kansas*, General Statutes, 79-201; *Maine*, Revised Statutes, 91-A,10, Subsection G; *Massachusetts*, General Laws, 59-5; *Minnesota*, Statutes, 272.02; *Nevada*, Revised Statutes, 361.125; *New Jersey*, Statutes, Annotated, 54:4-3.6; *New York*, McKinney's Consolidated Laws, Real Property Tax Law, sec. 420; *North Dakota*, Century Code, Sec. 57-02-08; *Ohio*, Page's Revised Code, Sec. 5709.07; *Oklahoma*, Statutes, 68:15.2; *Oregon*, Revised Statutes, 307.140; *Rhode Island*, General Laws, 44-3-3; *South Carolina*, Code of Laws, 65-1522; *Tennessee*, Code, 67-502; *Texas*, Vernon's Civil Statutes, Sec. 7150(1); *Utah*, Code, 59-2-1; *Vermont*, Statutes, 32-3802; *West Virginia*, Code, Sec. 678; *Wyoming*, Statutes, 39-7.

264. *Maryland*, Code, 81-9 (4).

265. *Alabama*, Code, Title 51, sec. 2.

266. *Hawaii*, Revised Laws, 128-18 (3); *North Carolina*, General Statutes, 105-296.

267. *Michigan*, Statutes, 7.7.

268. *Washington*, Revised Code, 84.36.020.

269. *Wisconsin*, West's Statutes, 70.11.

270. *New Hampshire*, Revised Statues, 72:23.

271. *Colorado*, Revised Statues, 137-17.

272. *Mississippi*, Code, 9697 (d).

273. *Missouri*, Vernon's Annotated Statutes, 137.100.

274. *Maryland*, Code, 81-9 (4).

275. *Pennsylvania*, Pardon's Statutes, 5453.202.

276. *Florida*, Statutes, 167.432.

personal property tax,[277] or provides that any such property shall not be liable to tax and assessment by any county or other political sub-division of the state.[278]

The general categories of exemption are then first listed: all property,[279] property,[280] any property,[281] real property,[282] all property, real and personal,[283] all real and personal property,[284] property, real or personal,[285] property, real and personal,[286] real and personal property,[287] all real and tangible personal property,[288] personal property,[289] all personal property.[290]

Within these general categories, further delimiting classifications develop: all churches,[291] churches,[292] church prop-

277. *North Carolina*, 105-297.

278. *Delaware*, Code, Sec. 9-8103.

279. *Illinois*, Sec. 120-500.2; *Minnesota*, Sec. 272.02; *Oklahoma*, Sec. 68:15.2; *South Carolina*, Sec. 65-1522; *Washington*, Revised Code, 84.36.020.

280. *California*, Sec. 214; *Delaware*, Code, Sec. 908103; *Hawaii*, Revise Laws, 128-18 (3); *Idaho*, Sec. 63-105B; *Wisconsin*, West's Statutes, Sec. 70.11.

281. *Texas*, Sec. 7150(1).

282. *New York*, Sec. 420; *Vermont*, Sec. 3203802.

283. *Alabama*, Code, Title 51, sec. 2; *Missouri*, Vernon's Annotated Statutes, Sec. 137.100 (6); *South Carolina*, Sec. 65-1522(4); *West Virginia*, Sec. 678.

284. *Mississippi*, Code, Sec. 9697 (d).

285. *Alabama*, Title 51, sec. 2.

286. *Colorado*, Revised Statutes, Sec. 137-17.

287. *Maine*, Sec. 91-A, 10, Subsection I; *Tennessee*, Sec. 67-502;

288. *Kansas*, Sec. 79-201(2).

289. *Connecticut*, Sec. 12-81 (12); *New Hampshire*, Revised Statutes, Sec. 77.8.

290. *North Dakota, Sec. 57-02-08.*

291. *Minnesota*, 272.02; *Pennsylvania*, 5454.202; *Washington*, 84.36.010.

292. *Arizona*, 42-271; *Minnesota*, 290.05; *Nevada*, 361.125.

erty,[293] chapels (other than marriage chapels),[294] houses (used as synonym for church),[295] all houses (used as synonym for church),[296] actual places,[297] all meetinghouses,[298] other regular places,[299] all buildings,[300] any building,[301] buildings,[302] every building or part thereof,[303] a building,[304] other buildings,[305] other additional buildings,[306] any recreational hall,[307] business offices,[308] office,[309] all burying grounds,[310] convents,[311] monastaries,[312] religious institutions.[313]

The exempted properties are exempt when used as,[314] used

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293. *Minnesota*, 272.02.

294. *Nevada*, 361.125.

295. *Connecticut*, 12-81-(13); *Maine*, 91-A,(10); *Massachusetts*, 59-5; *Maryland*, 81-9 (4); *Minnesota*, 272.02; *New Hampshire*, 72:23; *Ohio*, Sec. 5709.07.

296. *Arkansas*, 84-206; *Florida*, Sec. 192.06; *Michigan*, 7:7; *North Dakota*, Sec. 57-02-08; *Oregon*, 307.140; *South Carolina*, 65-1522 (3).

297. *Texas*, Sec. 7150 (1);

298. *Pennsylvania*, 5453.202.

299. Ibid.

300. *Kansas*, 79-201 (1); *New Jersey*, 54:4-3.6.

301. *Colorado*, 137-17.

302. *Iowa*, 427.1; *Maryland*, 81-9 (4); *New Hampshire* 72:23; *North Carolina*, 105-296; *Rhode Island*, 44-3-3; *South Carolina*, 65-1522 (4); *Utah*, 59-2-1; *Wyoming*, 39-7.

303. *Indiana*, 64-201.

304. *New Jersey*, 54:4-3.6.

305. *North Dakota*, Sec. 57-02-08.

306. *Arizona*, 42-271; *Nevada*, 361.125.

307. *Oregon*, 307.140.

308. *Idaho*, 63-105B.

309. *North Carolina*, 105-296.

310. *Florida*, Sec. 192.06.

311. *New Hampshire*, 72:23.

312. Ibid.

313. *South Carolina*, 65-1522 (2).

314. *Vermont*, 32-3802.

for,[315] must be used for,[316] intended and ordinarily used for,[317] used solely for,[318] actually so used (to that extent only),[319] actually used for,[320] used solely for,[321] used in conjunction therewith,[322] used in connection with,[323] used and set apart for,[324] wholly used for,[325] must be used wholly for,[326] exclusive use as,[327] used exclusively as,[328] used exclusively for,[329] occupied and used exclusively to,[330] used exclusively and directly for,[331] used solely and exclusively for,[332] used exclusively for and in connection with,[333] actually and exclusively used for,[334] actually and regularly used exclusively for,[335] actually and regularly and exclusively used for,[336]

315. *Arizona*, 42-271; *Hawaii*, 128-18 (3); *Nevada*, 361.125; *New Jersey*, 54:4-3.6; *North Dakota*, Sec. 57-02-08.

316. *Massachusetts*, 59-5;

317. *North Dakota*, Sec. 57-02-08.

318. *California*, 214; *Florida*, Sec. 167.432; *Iowa*, 427.1; *Ohio*, Sec. 5709.07; *South Carolina*, 65-1522;

319. *Washington*, 84.36.020.

320. *Indiana*, 64-201.

321. *Colorado*, 137-17.

322. *Illinois*, 120-500.2.

323. *Idaho*, 63-105B.

324. *Indiana*, 64-201.

325. *North Carolina*, 105-296.

326. *Washington*, 84.36.020.

327. *Texas*, Sec. 7150 (1).

328. *Kansas*, 79-201.

329. *Alabama*, Title, 51, sec. 2; *Arkansas*, 84-206; *Illinois*, 120-500.2; *Maryland*, 81-9 (4); *North Dakota*, Sec. 57-02-08; *Rhode Island*, 44-3-3; *Utah*, 59-2-1; *West Virginia*, Sec. 678; *Wyoming*, 397.

330. *Tennessee*, 67-502.

331. *Oklahoma*, 68:15.2.

332. *Colorado*, 137-17.

333. *Idaho*, 63-105B.

334. *New Jersey*, 54:4-3.6.

335. *Missouri*, 137.100.

336. *Kansas*, 79-201.

occupied as such,[337] occupied for,[338] actually occupied as,[339] dedicated to,[340] devoted to,[341] primarily and immediately for ... inter alia,[342] occupied and used solely for,[343] operated for.[344]

The entire issue of this case is rooted in *why* these exemptions are given. The language is explicit and can be given no other meaning than the intent here speaking loud and clear. The basis of every exemption is to aid, promote, encourage, benefit, and assist an end use of the properties in question for: religious worship,[345] public worship,[346] religious services,[347] religious purposes,[348] worship,[349] stated worship,[350] religious use,[351] religious meetings,[352] divine worship,[353] church pur-

337. *Idaho*, 63-105(B).

338. *Rhode Island*, 44-3-3.

339. *New Jersey*, 54:4-3.6.

340. *Washington*, 84.36.020.

341. *New Jersey*, 54:4-3.6.

342. *West Virginia*, Sec. 678.

343. *Maine*, 91-A, 10, Subsection I.

344. *California*, sec. 214.

345. *Alabama*, Title 51, sec. 2; *Arizona*, 42-271; *Colorado*, 137-17; *Connecticut*, sec. 12-81(13); *Indiana*, 64-201; *Maine*, 91-A, 10; *Massachusetts*, 59-5; *Missouri*, 137.100 (6); *Nevada*, 361.125; *New Jersey*, 54:4-3.6; *North Carolina*, 105-296; *Rhode Island*, 44-3-3; *Utah*, 59-2-1; *Wyoming*, 39-7.

346. *Arkansas*, 84-206 (1); *Florida*, Sec. 192.06; *Idaho*, 63-105B; *Kansas*, 79-201 (1); *Maryland*, 81-9 (4); *Michigan*, 7.7; *New Hampshire*, 72.23; *North Dakota*, Sec. 57-02-08; *Ohio*, Sec. 5709.07; *Oregon*, 307.140; *Texas*, Sec. 7150 (1).

347. *North Dakota*, Sec. 57-02-08.

348. *California*, 214; *Connecticut*, sec. 12-81 (12); *Florida*, Sec. 192.06; *Illinois*, 120-500.2; *Indiana*, 64-1; *Kansas*, 79-201 (1); *New Jersey*, 54:4-3.6; *North Dakota*, Sec. 57-02-08; *Rhode Island*, 44-3-3; *Washington*, 84.36.020; *Oklahoma*, 68.15.2 (within the state).

349. *Minnesota*, 272.02.

350. *Pennsylvania*, 5453.202.

351. *Indiana*, 64-201.

352. *Kansas*, 79-201.

353. *West Virginia*, Sec. 678.

poses,[354] their appropriate objects,[355] to carry out its purposes,[356] any activity it conducts,[357] including incidental activity,[358] publication of religious material.[359]

Every state makes a requirement that the entity owning or using be one of a religious nature, specifically, any church,[360] a church,[361] a recognized church,[362] churches,[363] a church organization,[364] church conferences,[365] church societies,[366] ecclesiastical body,[367] religious society,[368] any religious society,[369] strictly religious society,[370] recognized religious society,[371] religious societies,[372] religious bodies,[373] any religious body,[374] religious associations,[375] any religious association,[376]

354. *Hawaii*, 128-18(3); *Washington*, 84.36.010.

355. *Iowa*, 427.1.

356. *Tennessee*, 67-502.

357. *South Carolina*, 65-1522 (4) in respect to publication of religious material.

358. *Hawaii*, 128-18 (3).

359. *South Carolina*, 65-1522 (4).

360. *Delaware*, Sec. 8-501.

361. *Kansas*, 79-201; *Michigan*, 7.7; *New York*, Sec. 462; *Texas*, Sec. 7150(1).

362. *Florida*, 167-432.

363. *Illinois*, 120-500.2; *Vermont*, 32-3802; *Wisconsin*, 70.11 (1).

364. *Colorado*, 137-17.

365. *Vermont*, 32-3802 (1).

366. Ibid.

367. *Mississippi*, 9697 (d).

368. *Delaware*, Sec. 8-501; *Maine*, 91-A, 10, Subsection G.

369. *Idaho*, 63-105B; *Mississippi*, 9697 (d).

370. *Texas*, Sec. 7150(1).

371. *Nevada*, 361.125.

372. *Iowa*, 427.1.

373. *North Carolina*, 105-296; *South Carolina*, 65-1522 (4).

374. *South Carolina*, 65-1522 (4).

375. *Wisconsin*, 70.11(1).

376. *New Jersey*, 54:4-3.6.

non-sectarian religious association,[377] religious groups,[378] religious institutions,[379] religious organizations,[380] a minister of the gospel, priest or rabbi,[381] a congregation thereof,[382] any regularly recognized and constituted denomination, creed or sect,[383] religious corporations,[384] any religious corporation,[385] recognized religious corporation,[386] enumerated church and religious bodies,[387] associations,[388] officer of a religious denomination.[389]

The land given tax exemption is meagre in description: and lot,[390] lots,[391] and lots on which they are situated,[392] together with the lots upon which the same are situated,[393] lots or parts of lots upon which such buildings are erected,[394] and the lots of ground on which they stand used therewith and necessary thereunto,[395] any church grounds,[396] with the grounds thereto

377. *Washington*, 84.36.020.

378. *Iowa*, 427.1.

379. *Illinois*, 120-500.2; *Iowa*, 427.1; *Tennessee*, 67-502.

380. *Connecticut*, Sec. 12-81 (14); *Maine*, 91-A. 10, Subsection I; *Massachusetts*, 59-5; *New York*, Sec. 420; *North Dakota*, Sec. 57-02-08; *Oklahoma*, 68:15.2; *Oregon*, 307.140.

381. *New York*, Sec. 460. (an actual resident of this state).

382. *Mississippi*, 9697 (d).

383. *New Hampshire*, 72:23. (organized or incorporated in this state).

384. *Minnesota*, 317.66.

385. *Idaho*, 63-105B; *New Jersey*, 54:4-3.6.

386. *Nevada*, 361.125.

387. *South Carolina*, 65-1523. (hospitals, rest homes, etc.)

388. *Texas*, Sec. 7150 (1).

389. *New York*, Sec. 436.

390. *New Jersey*, 54:4-3:35.

391. *Utah*, 59-2-1; *Wyoming*, 39-7.

392. *Florida*, Sec. 192.06; *Oregon*, 307.140; *South Carolina*, 65-1522 (3).

393. *North Dakota*, Sec. 57-02-08.

394. Ibid.

395. *Nevada*, 361.125.

396. *Hawaii*, 128-18 (3).

annexed necessary for the and enjoyment of the same,[397] and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same,[398] the grounds attached to such buildings necessary for proper use and occupancy,[399] and the grounds appurtenant to such houses, buildings and parsonages and necessary for the respective uses thereof,[400] and the lands thereto appertaining,[401] with land on which they stand,[402] together with adjacent lands reasonably necessary for use of such building,[403] and the land and improvements appurtenant thereto and used therewith,[404] and their land,[405] whether the property consists of one tract or more,[406] whether or not contiguous to and a part of other property,[407] limited to what is reasonably necessary,[408] and the land upon which they stand and immediately surrounding the same, to an extent not exceeding one acre,[409] and land ... limited to one acre,[410] ground attached thereto reasonably necessary for proper occupancy and use in no event more than one acre,[411] ground actually occupied by them, up to two acres,[412] all lands ... up to two acres in any one case,[413] all

397. *Pennsylvania*, 5453.202.

398. *Arkansas*, 84-206 (1).

399. *Ohio*, Sec. 5709.07.

400. *Maryland*, 81-9 (4).

401. *New Hampshire*, 72.23.

402. *Connecticut*, 12-81 (13); *Michigan*, 7.7.

403. *North Carolina*, 105-296.

404. *Arizona*, 42-271.

405. *North Carolina*, 105-296.

406. *North Dakota*, Sec. 57-02-08.

407. *Wisconsin*, 70.11.

408. *Texas*, Sec. 7150 (1).

409. *Rhode Island*, 44-3-3.

410. Ibid.

411. *Texas*, Sec. 7150 (1).

412. *South Carolina*, 65-1522 (3).

413. Ibid.

real property up to two acres,[414] and grounds thereof up to five acres,[415] the land on which (any exempt buildings are) located necessary for fair enjoyment of same, not to exceed five acres,[416] together with ground owned thereby up to ten acres in any one case,[417] the lands the buildings are on up to fifteen acres,[418] all grounds not exceeding 320 acres in extent,[419] up to $1,500,[420] and necessary land to go with it, but limited to not more than $3,000 assessed value,[421] up to $5,000,[422] to value of $6,000,[423] limited to $10,000,[424] up to $25,000.[425]

That the property is only for religious use is indicated by a designation of pews, hymnals (books), slips, being also exempt; including pews and furniture,[426] all pews and furniture therein,[427] the pews, slips and furniture therein,[428] their pews, furniture and equipment,[429] including vestries and the pews and furniture within,[430] furniture therein, pews,[431] pews and furniture up to $10,000 for each parsonage,[432] and households

414. *North Dakota*, Sec. 57-02-08.
415. *Washington*, 84.36.020.
416. *New Jersey*, 54:4-3.6.
417. *Kansas*, 79-201.
418. *Indiana*, 64-201.
419. *Iowa*, 427.1.
420. *New York*, Sec. 460.
421. *Colorado*, 137-17.
422. *New Jersey*, 54:4-3.6.
423. *Maine*, 91-A, 10 Subsection G.
424. *Rhode Island*, 44-3-3.
425. *New Jersey*, 54:4-3.35.
426. *Indiana*, 64-201.
427. *Florida*, Sec. 192.06.
428. *Oregon*, 307.140.
429. *Connecticut*, 12-81 (13).
430. *Maine*, 91-A, 10.
431. *Michigan*, 7.7.
432. *Massachusetts*, 59-5.

and furniture pertaining thereto,[433] the furniture and personal property in,[434] the furniture contained therein,[435] furniture,[436] with their furniture and equipment,[437] and contents thereof,[438] suitable articles of personal property,[439] and personal property not exceeding $6,000 in value,[440] the books and furniture therein,[441] with furniture and books therein contained,[442] and their private libraries,[443] libraries of ministers of the gospel,[444] library and office equipment of a minister of any religion actively engaged in ministerial work in the state where such property is used by minister in his work,[445] and personal property therein used by ministers engaged in full time work in the care of the churches of the fellowship within the state,[446] all religious books kept for sale by ministers of the gospel and colporteurs.[447]

However, the use must be: not for profit,[448] not operating for profit,[449] must not be for profit,[450] not held for profit,[451]

433. *West Virginia*, Sec. 678.

434. *New Jersey*, 54:4-3.6.

435. *Maryland*, 81-9 (4).

436. *North Carolina*, 105-297.

437. *Arizona*, 42-271; *Nevada*, 361.125.

438. *South Carolina*, 65-1522.

439. *Iowa*, 427.1.

440. *Maine*, 91-A, 10 Subsection G.

441. *Ohio*, Sec. 5709.07; *Texas*, Sec. 7150 (1); *South Carolina*, 65-1522.

442. *Kansas*, 79-201 (1).

443. *North Carolina*, 105-297.

444. *Alabama*, Title 51, sec. 2.

445. *Oklahoma*, 68:15-2.

446. *Vermont*, 32-3802.

447. *Alabama*, Title 51, sec. 2.

448. *Mississippi*, 9697 (d).

449. *New Jersey*, 54:4-3.6.

450. Ibid.

451. *Florida*, Sec. 192.06.

not held for investment,[452] if no income is derived therefrom,[453] yielding no revenue,[454] and not leased or otherwise used with a view to pecuniary profit,[455] and not leased or otherwise used with a view to profit,[456] as long as the property is not used or held for profit,[457] if not leased or otherwise used for profit,[458] let for rent or hire or for use of business purposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for education, religious or charitable purposes,[459] If a portion of the realty is used to produce income, even if the income is applied to exempt purposes the exemption is lost, though it subsists on the remaining property,[460] the exemption is lost when the property is used for other than church purposes and valuable consideration is received therefore,[461] where property otherwise exempt is used in part for non-exempt purposes, a pro-rata exempt shall apply,[462] if only a part of property is used for religious purposes, then a pro-rata exemption applies,[463] but any building being a house of worship which shall be rented for non-religious purposes loses exemption,[464] but so much of any parsonage as is rented is taxable,[465] if principal or income used for religious or charitable purposes (then, tax exempt),[466] any

452. *Delaware*, Sec. 9-8103.

453. *South Carolina*, 65-1522.

454. *Texas*, Sec. 7150 (1).

455. *Iowa*, 427.1.

456. *Arkansas*, 84-206; *Illinois*, 120-500.2.

457. *Arizona*, 42-271.

458. *Kansas*, 79-201 (1); *Ohio*, Sec. 5709.07.

459. *Alabama*, Title 51, Sec. 2.

460. *Hawaii*, 128-18 (4).

461. *Nevada*, 361.125.

462. *Wisconsin*, 70.11 (1).

463. *North Carolina*, 105-296.

464. *Florida*, Sec. 192.06.

465. *Maine*, 91-A, 10, Subsection G.

466. *Connecticut*, Sec. 12-81 (12).

part of any house of public worship which is kept or used as a store or shop or for any purpose other than for public worship or schools shall be taxed,[467] may be supported in part by fees and charges received from beneficiaries using said property, provided the building is wholly controlled by and entire income is used for religious purposes,[468] is allowed an exemption for all property up to $2,500 which is not used solely and directly for religious purposes,[469] exemption does not extend to leaseholds,[470] provided rent is not paid for such land or improvements,[471] the property exempt from tax being limited to realty exclusive of burying grounds,[472] parking lots used for church purposes are exempt. However, special claim for exemption must be filed,[473] if principal or income is used for religious, benevolent or charitable purpose,[474] vacant lands up to forty acres bought with bona-fide intention to erect structures for religious use thereon,[475] to the extent (actually so used),[476] and none other,[477] and, no more land than is necessary,[478] on land on which there are no structures suitable for religious purposes, but on which such buildings are contemplated,[479] If religious property is leased out, it loses its exemption, regardless of whether income so received is applied to religious purposes. If only a part of premises are used for religious purposes, then only that portion is exempt.[480]

467. *Oregon*, 307.140.
468. *New Jersey*, 54:4-3.6.
469. *Oklahoma*, 68:15.2.
470. *Ohio*, Sec. 5709.07.
471. *Arizona*, 42-271.
472. *Hawaii*, 128-18 (4).
473. *Oregon*, 307.140.
474. *Massachusetts*, 59.5.
475. *Indiana*, 64-201.
476. *Washington*, 84.36.020.
477. *Alabama*, Title 51, Sec. 2.
478. *Montana*, Sec. 84-202.
479. *Connecticut*, Sec. 12-88.
480. *Tennessee*, 67-502.

Whereas the Constitutions of most states do not include provisions for parsonages, the statutes enlarge the general exemptions in order to include them: any parsonage,[490] any parsonage or dwelling,[491] every parsonage,[492] parsonages,[493] church parsonages,[494] parsonage or a parsonage,[495] residence,[496] dwelling including usual outbuildings,[497] dwelling houses,[498] dwelling place,[499] house,[500] parish house,[501] housing,[502] other housing facilities,[503] any building.[504]

But such parsonages have restricted occupants and use. They are for a bishop,[505] for a churchman,[506] officiating clergyman,[507] its minister,[508] ministers,[509] district supervisor of

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490. *Idaho* 63-1-5B; *Maryland*, 81-0 (4).

491. *Kansas*, 79-2-1 (1).

492. *Florida*, Sec. 192.06.

493. *Illinois*, 120.550.2; *Hawaii*, 128-18 (3); *Nevada*, 361.125; *Vermont*, 32-3802; *Washington*, 84.36.020; *West Virginia*, Sec. 678.

494. *New Hampshire*, 72.73; *Wyoming*, 39-7.

495. *Kansas*, 79-201; *Maine*, 91-A, 10, Subsection G; *Michigan*, 7.7; *New Jersey*, 54:4-3.6; *South Carolina*, 65-1522.

496. *Colorado*, 137-17; *New Jersey*, 54:4-3.6; *New York*, Sec. 462; *North Carolina*, 105-296, *North Dakota*, Sec. 57-02-08.

497. *North Dakota*, Sec. 57-02-08.

498. *Connecticut*, Sec. 12-81 (14); *Rhode Island*, 44-3-3.

499. *Texas*, Sec. 7150 (1).

500. *Colorado*, 137-17.

501. *New Hampshire*, 72.73.

502. *Wisconsin* 70.11 (1).

503. *Illinois*, 120.550.2.

504. *Colorado*, 137-17.

505. *North Dakota*, Sec. 57-02-08.

506. *Colorado*, 137-17.

507. *New Jersey*, 54:4-3.6; *New York*, Sec. 462 (where owned by the church); *Rhode Island*, 44-3-3.

508. *North Carolina*, 105-297.

509. *Texas*, Sec. 7150 (1).

religious organization,[510] occupied by their pastors,[511] occupied by its minister,[512] actually used by clergymen,[513] for ministers, their spouses, children, and domestic employees performing the duties of their vocation as ministers at such church or religious institution,[514] pastors, their ordained assistants, members of religious orders and communities, and ordained teachers,[515] the bishop, priest, rector or other minister in charge of the services of the church,[516] a minister of the gospel, priest, or rabbi, an actual resident of the state, who is engaged in work assigned to him by the church or who is unable to perform such work due to impaired health or is over seventy.[517]

Just how the states feel in respect to giving money to religious establishment is reflected in the prohibition of any tax money or school money being directed to the support of any sectarian school. The prohibition exists in every state,[518] but Rhode Island, Vermont and West Virginia.

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510. *New Jersey*, 54:4-3.6.

511. *New Hampshire*, 72:23.

512. *Kansas*, 79-201.

513. *Connecticut*, 12-81 (14).

514. *Illinois*, 120-500.2.

515. *Wisconsin*, 70.11 (1).

516. *North Dakota*, Sec. 57-02-08.

517. *New York*, Sec. 460.

518. Constitution: *Alabama*, Art. 14, sec. 263; *Alaska*, Art. VII, sec. 1; *Arizona*, Art. 9, sec. 10; *Arkansas*, Art. 14, sec. 2; *California*, Art. 9, sec. 7, 8; *Connecticut*, Art. 8, sec. 2; *Delaware*, Article 10, sec. 4; *Florida*, Declaration of Rights, Art. 6, Art. 12, sec. 13; *Georgia*, Art. 1, sec. 2-114; *Hawaii*, Art. IX, sec. 1; *Idaho*, Art. 9, sec. 5; *Illinois* (Statute), Title 122:22-10; *Indiana*, Art. 1, sec. 6; *Iowa*, (Statute) Sec. 343.8; *Kansas*, Art. 6, sec. 8; *Maryland*, Art. VIII, sec. 8; *Massachusetts*, Art. 18 (Articles of Amendment); *Michigan*, (Statute) Sec. 15.3366; *Minnesota*, Art. 8, sec. 2; *Mississippi*, Art. 8, sec. 208; *Missouri*, Art. 9, sec. 8; *Montana*, Art. V, sec. 35; Art XI, sec. 8; *Nebraska*, Art. VII, sec. 11; *Nevada*, Art. 11, sec. 10, (Statutes), Sec. 387.045; *New Hampshire*, Part 2, Art. 83; *New Jersey*, Art. 8, sec. 4, par. 2; *New Mexico*, Art. XII, sec. 3; *New York*, Art. II, sec. 4; *North Carolina*, Sec. 115-275; *North Dakota*, Art. VIII, sec. 152; *Ohio*,

There has been a general rule of strict construction of statutes and constitutional provision, reiterated in a majority of court decisions. Taxation is the normal condition and tax exemption is the abnormality, so that the leaning has been toward the inclusion in the tax base. The religious organization desiring the exemption usually must make the application for it and assume the burden of proof of its contentions. The case must be brought into the terms of the statute or constitutional provision. The courts generally refuse to extend the statute beyond its clear meaning. Generally the courts do not discriminate in favor of any sect unless that sect is a very powerful political one in the community and such decisions are very transparent in the reading.

It must be recognized that the object of the tax exemption was to aid financially enfeebled churches with the bare necessary means to their survival. As our society has moved into the cultural era of affluence the churches have moved with it, and this financial aid is no longer necessary to their survival. More recent cases reflect this attitude.

The cases generally fall into easy classification. The prohibition against gain by the church has held against a number of onslaughts against it. Where 15% of church's building is rented commercially, exemption is lost, (259 Mo. 233). Where a lot belonging to church adjoining its property is rented out as a store, it is not exempt, (148 Ky. 580). Property owned by a church and rented out does not retain the tax exemption, (206 Ala. 632). Land owned by church and rented for profit is taxable, although the net income from land is used for religious purposes, (Iowa, Op. Atty. Genl. 1923-04). Property owned by church but used as rented apartments on which rent was paid is not tax exempt, (110 S. E. 2d 11, Georgia). House and lot

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Art. VI, sec. 2; *Oklahoma*, Art. 2, sec. 5; *Oregon*, Art. 1, sec. 5; *Pennsylvania*, Art. 3, sec. 18, Art. 10, sec. 2; *South Carolina*, Art 11, sec. 9; *South Dakota*, Art. VI, sec. 3; *Tennessee*, Art. 11, sec. 11; *Texas*, Art. 1, sec. 7; *Utah*, Art. X, sec. 13; *Virginia*, Art. 141; *Washington*, Amendments 4 and 34; *Wisconsin*, Art. 1, sec. 18; *Wyoming*, Art. 1, sec. 9.

owned by church for which it collects rent which it uses for church purposes is not exempt, (38 N. M. 403). A school run by a church to inculcate its religious tenets in pupils, not open to the public, is not exempt because it is neither a charity nor a religious enterprise, (148 O. S. 654). Church organized a subsidiary corporation to publish religious books and claimed the realty of the subsidiary as exempt as a charitable enterprise. Held: its operations must be wholly religious, if any non-religious, even charitable elements come in, it loses its exemption, and all its property is taxable, even the religious part, (355 Mo. 257). Farm used by church to raise grain for its aged and needy members was not exempt, because a proper religious purpose is not the distribution of food to its members, (75 Idaho 162). Religious institution's realty used for parking lots, cafeteria for its employees was not exempt even though not conducted for profit; it was not a religious operation, (360 S. W. 2d 458 Tennessee). Where church property consisted of building, automobiles, trailers, tents where chief business was preparation, recording and broadcasting of religious programs, and, in the building a fifteen minute religious service was held five days a week, held not entitled to exemption, (341 S. W. 2d 467, Texas). A publishing house devoted solely to publication of religious books using all profits for this purpose, held not religious group entitled to exemption, (123 N. E. 697, Indiana). Operation for profit will deny this exemption under law (religious hospital); profit means not that there is or may be a profit, but where the operation is undertaken for the purpose of rendering a profit. (290 P. 2d 275, California). A religious summer camp is certainly not a place of worship, (201 P. Super. 5). The most recent case is that of Temple Beth Sholom which leased 12½ acres of land to the Roslyn Summer Day Camp in which Supreme Court Justice Howard T. Hogan on August 20, 1969 in New York ruled that religious institutions lose their tax exempt status on any part of their property leased for commercial use.

Even more stringent rules apply in respect to personal property. Personal property of church primarily used for gain

and reinvestment not exempt, (130 Miss. 637). A trust fund devoted to propagation of Christianity is not exempt, (119 Ky. 208). Endowment fund administered by religious group devoted wholly to relief of retired ministers, their widows and orphans, is not tax exempt. (Op. Atty. Genl, Iowa 1930). A provision of the Intangible Property Tax Act exempting individual's intangibles owned, held or used exclusively for 'religious purposes' was unconstitutional, (44 Ariz. 379). Where certain land was exempted while owned by a church organization, the fund realized by a sale of such land is subject to taxation, (109 Me 22). Where a charter permitted a church corporation to hold property in amount of $350,000 exempt from taxation and such property was originally worth less than that sum has since become worth almost a million, held: subject to taxation insofar as it exceeded the sum fixed by charter (192 Mass 412).

Courts generally have held that church property is subject to assessments. Local assessment not included in exemption (248 Ala. 227). Church property is subject to improvement assessments, (192 Ark. 908). Church property is not exempt from assessment for street paving, (Georgia, 13 S. E. 252). The exemption does not extend to special assessment of cities, (300 Mich. 80). A church was liable to assessment for paving a street in front of its property, (165 Pa. St. 475). Churches are not, and may not be, exempt from assessments, (105 S. C. 303). Constitutional exemption does not apply to special assessments, (40 Utah 83). Exemptions do not extend to local levies, (35 Cal. 2d 760), applies only to ad valorem taxes and not special assessments, (Op. Atty. Genl. La., 1940-42, p. 3999). Includes direct ad valorem taxes only, (233 Ala. 138). Tax exemption is applicable only to realty, (246 Ala. 486).

Vacant lands held by a church generally are not exempt. Vacant lots bought by church authorities and held in private ownership, in view of increase of city, and with intention of possibly erecting a church thereon when needed, are not exempt as 'places of worship,' (36 La. Ann 804). This

exemption extends only to such property as is actually and exclusively used . . . and does not include property that is only intended to be so used in the future, (13 Mont. 559). This exemption covers only actual use, and not intentional future use of property for religious purposes, (113 Calif. A. 2d 392). Vacant lot upon which it is proposed to build a church building, which would be exempt, is not exempt, (19 C. D. [Ohio] 249). Unused church lot not exempt, (144 Miss. 360). A vacant lot owned by a church does not qualify, (86 Ar. 205). A vacant lot intended for eventual religious purpose but leased to city in interim is not tax exempt, (121 Colo. 470). Empty land on which were held church services not exempt, because unimproved land is not statutorially exempt, (19 N. J. Misc. 232). Vacant land purchased with a view to building church buildings in future was not exempt, (26 N. J. Misc. 123). Vacant lot intended to be built on by church is not exempt, (178 Mass. 404). Large open land owned by church with pond where fish are caught and consumed by churchmen is not exempt, (97 N. H. 396). Vacant tract of 40 acres, owned by a religious group who hoped some day to build a church or school there and which was occasionally used by another school as a football field held not exempt, (Iowa, Op. Atty. Genl. 1955).

Property held by a church under a lease from another church is not exempt, the lessor church deriving a profit from lease, (31 Ohio L. R. 567). Property leased to a church is not exempt, even though leased for religious purposes, (118 Fla. 771). Lands conveyed to a religious society are exempt from taxes in part only as to portion used for religious purposes, and when church building burned and the members disbanded only the portion used as a cemetery was exempt, (212 Ark. 924). It is beyond legislative competence to exempt from taxation more than property used as place of public worship, (91 A. 2d 372, Penna.) Specific legislative tax exemption of wharf owned by church held invalid, as an arbitrary distinction and improper state aid of church, (106 Md. 281). Church parking lot not exempt, (138 Ohio S. 246). Parking lot of church is exempt, (35 N. J. Super 67).

Courts have constantly reiterated that the basic test for exemption is the use of church property, (89 N.Y.S. 2d 300, aff'd N.Y. 716). Exemption is based solely on use of premises and not on ownership, (59 Neb. 571). Use of property is test to right of exemption, (109 Neb. 106). Church exemption does not depend upon ownership of property but upon the purpose to which property is put, (La. Op. Atty. Genl. 1922-1924, p. 755). The property, and not its revenues, must be so applied before exemption will attach, (57 Ark. 445). The exemption will be determined on the primary use, not the secondary or incidental use, (409 Ill. 376). Whether or not use is religious is a question of fact for the taxing officials, (Fla. Op. Atty. Gen. 061-104, June 30, 1961).

Originally the parish houses were not exempt on the theory that the use of the property and not the ownership determined the question of exemption. A parsonage is used as a residence which was at first seen as a secular purpose. Parsonage is subject to taxation, (32 N. J. L. 360). A parsonage erected by a religious society on their church lot was liable to taxation as real estate, (41 N. J. L. 117). A building used by a religious society as a rectory or parsonage was subject to taxation, (30 La. Ann. 259). A parsonage erected for the convenience and accommodation of the pastor of a church is not exempted, (38 Ind. 3). A statute exempting a parsonage from taxation held invalid under Illinois constitution which prohibits the Legislature from exempting from taxation property not used exclusively for religious purposes, (232 Ill. 158). Parsonage liable to taxation although standing on the same parcel of land as the church edifice, 22 Abb. N. C. (New York) 52. Residence of priests, bishops, parson, not exempt (in a series of cases, see for example 25 Ohio St. 229). A house converted to a church, with parlor floor used for services of a church and Sunday school, while pastor or minister in charge lives with his family on the second floor, not used exclusively as a church and not exempt, (58 Misc. N. Y. 639).

The usual church encroachment into this area developed with the religious community winning passage of many statutes

giving exemptions.[519] Cases began shortly to reflect this: Parsonage is exempt, (158 Minn. 48). Phrase 'church property' includes rent-free residence furnished to executive director of foreign missions of church, (22 N. W. 2d 642 Minn.). Church owned residence located near but not on church grounds and occupied by church's minister as part of his salary is exempt, (121 N. W. 2d 131, Iowa). Caretaker resided on top floor of 1½ story house used for religious worship; entire building held exempt, (151 Ohio S. 70). Living quarters of priest at lay retreat are exempt, (35 Cal. 2d 760). A rest home for retired Christian missionaries is a religious use and exempt, (151 Calif. A. 2d. 523). Home for retired clergyman is exempt (religious corporation subject to control of a foreign corporation), (41 N. J. Super. 504). House and lot for visiting bishops are exempt. (91 Mo. 671). Retreat buildings used ten weeks per year held exempt as place of worship, (191 Md. 441). Caretaker's house on church property is exempt as property occupied for purposes of church (97 N.H. 396).

The issue of tax exemption for religion is many faceted, and arguments concerned with each aspect tend to become stereotyped. All of the arguments, on both sides, are therefore presented here for review.

For Establishment and Special Privilege of Tax Exemption:

So long as the tax exemption deals equally with all religions, without discrimination, the constitution is not violated.

For Disestablishment:

We must recognize that the exemption is a subsidy from the state in direct proportion to the amount of taxable property which the religious organization owns. The exemptions are not, therefore, equally applicable to all religions, or all sects of the Christian religion. Exemptions fall with largess upon the largest land holders. The richer denominations have a clear advantage over the poorer ones. Members of the poorer congregations are

519. See page 59.

put in the position of contributing to the support of the richer denominations by an increased rate of taxation upon their individual property.

For Special Privilege:

If certain functions of the religious organization which is exempted were not provided by some such private institution or organization, the ultimate burden of rendering them would fall upon the state.

For Disestablishment:

If the churches engage in eleemonsynary activities, they can qualify for exemptions to the extent of that pro-rata activity under the existing laws which exempt other such organizations. In 1968, Vice President Hubert Humphrey reminded the General Assembly of the National Council of Churches in a speech that the Protestant and Orthodox churches of the nation spend "only 41 cents a month for everyone who belongs to a church in America" on services to those outside the church.[520]

For Special Privilege:

The sum involved is negligible, insignificant. If the churches were taxed the general tax rate would not decline for the rest of the tax payers.

For Disestablishment:

On the local level there is a real possibility of reducing the real estate tax rate. The National Conference of Christians and Jews, studying three American cities, concluded that if all exempt church property were placed on tax rolls in Nashville, Tennessee, tax revenue would be increased 6.4%, in Washington, D.C. 4.6% and in Boston, 3%. They note further that in Pennslyvania churches own 14% of total taxable property.[521]

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520. Balk, Alfred, *The Religion Business*, Richmond, Va., John Knox Press, 1968, p. 26.

521. Tanner, Andrew D., *The Question of Tax Exemption for Churches*, N.Y. National Conference of Christians and Jews, 1963, p. 18.

The assessed value of all of New York City, its five boroughs, Manhattan, Bronx, Queens, Kings (Brooklyn), Richmond (Staten Island) is $47 billion. Churches in America own probably twice this much according to the CBS survey.[522] All tax entities are in search of tax dollars as the taxable base constricts. Revenue which is needed by the total community is lost through religious exemption. Religion should divulge its total holdings before it hides behind the claim it presents in this argument.

For Special Privilege:

Taxing churches would be calamitous financially for churches.

For Disestablishment:

Churches have not come forward to put their actual financial conditions on public record so that an objective appraisal of the effect of a tax can be made.

Churches have made deep inroads into the capitalist community with vast stock holdings, and business ownership. When a Wall Street investment company attempted a study of securities held by churches three years ago, it counted up to nearly three billion dollars before concluding that it was an impossible task. Three billion dollars worth of security, at a modest 5% yield brings in $150 million in one year. Mortimer Caplin, the Commissioner of Internal Revenue in 1962 during which time the Internal Revenue Service conducted a statistical analysis of income tax returns in respect to gifts to religious organizations estimates that churches now receive $5.5 billion a year in the collection plates.[523] By comparison the following are figures of total industry incomes:

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522. CBS report, op. cit., p. 8.

523. Ibid, p. 4.

furniture industry	$ 5.5 billion annual income[524]
leather	2.5 billion annual income
mining	5.5 billion annual income
printing	16.0 billion annual income
textiles	6.5 billion annual income

The figure of $5.5 billion is only for giving to churches and does not represent the profits from their businesses, from their property rentals, or yield from their stock holdings.

For Special Privilege:

The functions which the religious organizations perform in the community can not be done by any other agency. They render many community and charitable services to many people.

For Disestablishment:

Community services which churches and religious organizations provide are not truly public. They are mainly directed toward each sect's church members and their families. All major community services are now handled by city, county, state and federal agencies, such as welfare and relief programs, social security for disabled and aged, hospitals for the mentally ill and mentally defective, schools for the blind and deaf, child care centers and foster homes, institutions for delinquents, alcoholics, narcotics and the aged, unemployment compensation, workmen's compensation, special help for Veterans with education and business loans, tuberculosis and general hospitals and clinics, housing through special financing. Private non-sectarian industry hires the handicapped and train them. Health programs and research for heart, cancer, arthritis are the concern of private agencies. Red Cross and the National Guard aid in disaster areas. A myriad of public and private agencies function through Community Chest arrangements to assist families with problems. What work the churches do is small percentage wise, and given along sectarian lines. Further it is contestable that private religious groups function more competently or perform

524. Robertson, op. cit., p. 155.

services more economically than non-sectarian government directed programs such as social security, etc.

For Special Privileges:

Since churches are non-profit organizations, they possess no net income and therefore no capacity to pay taxes.

For Disestablishment:

Churches are investing surplus funds, to such an extent that it has become an open scandal. CBS ran a survey on this question to determine how the public feels in relation to churches disclosing whether they are really non-profit organizations. The question asked was "Do you think religious institutions should be required to report all property and income." The General public replied 66% yes; Congress 65% yes and the Clergy 53%. To a second question, "Do you think that churches should be required to report their commercial property and income?" the percentage of replies was: general public, 77%; Congress, 94% and clergyman 91% yes.[525] The later figure indicates that the lower echelon clergy want to know what is going on in their churches too.

For Special Privileges:

Churches are good institutions and deserve to receive governmental support so that they can pursue their programs.

For Disestablishment:

Many beliefs and practices of one church are repugnant to other churches. There is a religious diversity of opinion now which splits our nation in respect to birth control, legalization of abortion, liberalizing divorce laws and tax support for parochial schools.

For Special Privileges:

This would be a double tax on individual church goers, on their personal income and once in taxes paid from church funds.

525. CBS report, op. cit., p. 6.

For Disestablishment:

All donations to churches from personal incomes are deductible from gross taxable income, so that no double taxation exists. Members of churches which would be taxed on real estate holdings would suffer no more than any other tax paying institution. The members of a church are responsible for the financial health of their church; this is not the responsibility of the general public or the government.

For Special Privileges:

The power to tax is the power to destroy.

For Disestablishment:

Not while there are 100 million church goers in America!

For Special Privileges:

The churches are the fountain of ethics and morality in our culture, and they should be encouraged.

For Disestablishment:

Churches have no monopoly on either ethics or morality. Other institutions in our culture also foster these values, notably the public school system. Further it is not the business of the state to raise its revenue only from the "baser elements" of the population. Our great scientists, inventors and educators are not exempt from taxation on the ground that they are doing good for the general population or that they are moral examples. We cannot tax private citizens in relation to their virtuous characteristics, or the lack thereof, and neither should we give tax relief to a religious institution upon this premise. The greatest institution in America, with the first imposed chore of building moral character, is not given exemption at all: the home.

For Special Privilege:

Exemptions have been with us, always. Every state in the union and the federal government grants them.

For Disestablishment:

The universality or the age of a custom has nothing to do with whether that custom is just. Segregation by race has been with us, always and still flourishes in many sections of America. We need a constant review of the assumptions underlying all our institutions as we mature as a culture, and we must guard basic rights against majoritarian control.

For Special Privilege:

Churches are divinely inspired and therefore immune from civil authority and taxation. Ezra 7:24 "We also notify you that it shall not be lawful to impose tribute, custom or toll upon any of the priests, the Levites, the singers, the doorkeepers, the temple servants, or other servants of this house of God."

For Disestablishment:

" 'It is lawful to pay taxes to Caesar, or not? Should we pay them or not?' . . . Jesus said to them, 'Render to Caesar the things that are Caesar's and to God the things that are God's' " Mark 12:14, 15, 17. Matthew 22:17, 21.

"When they came to Capernaum, the collectors of the half-shekel tax went up to Peter and said, 'Does not your teacher pay the tax?' He said, 'Yes' " Matthew 17:24.

"For the same reason you pay taxes, for the authorities are ministers of God, attending to this very thing. Pay all of them their dues, taxes to whom taxes are due, revenue to whom revenue is due . . ." Romans 13:6-7.

"And all went to be taxed, every one into his own city, And Joseph also went up from Galilee . . . to be taxed with Mary his espoused wife, being great with child." Luke 2:3, 4, 5.

For Special Privilege:

The Constitution guarantees there will be no laws "prohibiting the free exercise" of religion. Ending religious exemptions would hamper the free exercise of religion by church members.

For Disestablishment:

The Free Exercise clause of the First Amendment protects the rights to prayer, mass, sermons, sacrament and all practices of religious beliefs. Ad valorem tax is a non-discriminatory fee placed alike *on all who desire to hold land.* It is not aimed at either promotion or restriction of religious belief. The First Amendment also protects freedom of speech but does not relieve owners of printing houses from taxes upon their land. The First Amendment does not require a subsidy be given for "Free Exercise" of religion in the form of fiscal exemptions from taxes. Freedom from taxation is not a prerequisite attaching to the privilege.

For Special Privilege:

The state must protect the rights of the religious people.

For Disestablishment:

The term "religious people" is not synonymous with the term "church goer" in America. The state must also protect those who do not attend churches out of their own choice. Going to or staying away from church, or membership in a church, is a matter of private decision. The state can not burden the non-church goer with taxes in order to give relief to persons who desire to be 'churched.' Non-church goers are Hohfeldian complainants with personal and proprietary interest in the matter of reduced taxation. If they desired to contribute to the churches they could do this simply by attending churches or contributing to them. The discrimination here is against non church members. Government compulsion is used to extract higher property taxes. This is an indirect means of obtaining money from the general taxpayer which he would not of his own volition otherwise give.

For Special Privilege:

The church goer can not stand the extra burden of money required.

For Disestablishment:

The church goer will also have his tax reduced, and can give the money he saves to the church of his choice rather than having a larger benefit accrue to the biggest land holding church in his community. A tax on a church is not a tax on an individual so long as he is free to support or not support that church as he desires. That freedom is his in America. There is no prohibition as to where he directs his own money.

For Special Privilege:

If churches must be taxed, they should pay only for services received such as fire protection, mail service, police protection, traffic control, streets, streetlighting, connecting with water and sewerage outlets, assistance in times of natural catastrophies, protection in time of war, and not for health programs, city parks, etc. Government carries on various programs that some churches (and their members) find unconscionable, such as birth control measures. Why tax church goers against their conscience?

For Disestablishment:

The situation of all taxpayers is that some government services and activities which are supported by their tax funds go to the general welfare and not back to the specific taxpayer.

For Special Privilege:

Churches raise property values, bring people to the community and increase the local tax base resulting in lower taxes.

For Disestablishment:

A recent study by a Washington, D.C. attorney finds the churches in much litigation over zoning with property owners asking for churches to be excluded from their neighborhoods because the church buildings are undesirable incursions because of noise, mere inconvenience, depressiveness, violations of police, fire, health and sanitary regulations, disturbances of the

peace, bell ringing, increased traffic, parking problems, nuisance value[526]

For Special Privilege:

The repercussions of abolishing religious exemptions would redound against the Supreme Court, to a greater extent than the decision to remove Bible and prayer from public schools.

For Disestablishment:

The National Council of Churches reports that the influence of churches and the pressure they can exert might be less than may be assumed. As reported by them, for specific years, the percentages of persons feeling that religion is losing its influence are as follows:[527]

1957 . . . . . 14%
1962 . . . . . 31%
1965 . . . . . 45%
1967 . . . . . 57%

At a conference hosted by the Social Research Center of the Jesuit-run Gregorian University in Rome, Italy, two American Sociologists reported[528] that irreligion is on a steep rise in America and that it would be more evident if there was not so much active discrimination directed against non-believers.

In any event the Supreme Court has weathered other storms: Desegregation, One-Man-One-Vote.

For Special Privileges:

Churches are above the law: this is religion.

For Disestablishment:

In America we begin with the premise of equal rights to all men and women. The claim of religion is of a superior right

526. Curry, James E. *Public Regulation of the Religious Use of the Land,* Charlottesville, Va., Michie Co., 1964.

527. Whitman, op. cit., p. 229.

528. Associated Press, August 20, 1969.

because of certain ideas the religious person holds. They ask to be free of the ordinary burdens of society at the expense of those who support the society generally.

There are 256 brands of religion in America, all claiming to be the "one true faith." These 'religions' include godless, prayerless, heaven-less groups of all nature from Buddhists, Taoists, Ethical Culturists, Humanists, to those espousing some vague Weltanschauung. Religion is merely set apart from government, not above it. Each religion has full liberty to spread respective doctrines, at its own cost. Whether one or any particular or all religions thrive or decline is none of the business of the state. All the state can do is to give a free field to all, and then let them succeed or fail in proportion to their own merits and their ability to convince men and women of their truth and of the merits of their claim to monetary support at the hands of the individuals thus convinced. No amount of sophistry can disguise the fact that church is primarily a doctrinal organization and among the Christian sects there is no clear and compelling support to the claims of any to be above the law.

> Benjamin Franklin: "When a religion is good, I conceive it will support itself; and when it does not support itself, and God does not take care to support it so that its professors are obliged to call for help of the civil power, tis a sign, I apprehend, of its being a bad one."[529]

For Special Privilege:

A tax exemption is only an indirect subsidy, any benefit to religion is merely incidental to the 'public purpose' which religion promotes. Remember that this 'public purpose' is the support which the church gives to the state. As noted by New Hampshire in its Constitution,[530] religion

> "will lay in the hearts of men, the strongest obligations to due subjection."

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529. Franklin, Benjamin, *Works*, Vol. XVII, p. 506.

530. Pt. I, Art. 6th.

which the state also requires of its citizens. Religion should be supported as an ally of state in teaching this through religious doctrines.

For Disestablishment:

In our times, people understand the necessity of a good government and the benefits to all which are derived from the support thereof. The American people are not so unsophisticated that they need be kept in fear or educated to "due subjection." The government does not need the church to be its 'press gang.'

For Special Privilege:

The tax exemption is only an indirect subsidy and is not a breach of separation.

CONCLUSION

For Disestablishment:

There is no secular legislative purpose in any of the Constitutions or Statutes of any of the United States. The primary effect of the law is to advance religion. The exemption is a classification solely in terms of religion with a primary effect of the laws being to advance religion. The classification exempts only those activities which are religious, exempts only those properties with a religious alliance, always in a sectarian fashion. The government can not thus go into the business of religion doing indirectly that which is forbidden directly.

In the instant case there are four sections of the New York Real Property Laws which are violative of the First Amendment to the Constitution of the United States:

> Section 420, sub. 1: Real property owned by a corporation or association organized exclusively for . . . religious . . . purposes . . . and used exclusively for carrying out

thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section.

Sec. 426. Real property held by any officer of a religious denomination shall be entitled to same exemption from taxation . . . as property owned by a religious corporation.

Sec. 460. Real property owned by a minister of the gospel, priest or rabbi, an actual resident of this state, who is engaged in work assigned to him by the church, or who is unable to perform such work due to impaired health, or is over 70, shall be exempt from taxation to the extent of $1,500.

Sec. 462 ". . . property owned by a religious corporation while actually used by the officiating clergyman thereof for residential purposes shall be exempt from taxation.

The order of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

MADALYN MURRAY O'HAIR
P. O. Box 2117
Austin, Texas 78767
Attorney for O'Hair, Amicus Curiae, pro se.

LOLA BOSWELL
1010 Vermont Avenue
Washington, D.C. 20005

JAMES H. ANDERSON, JR.
2204 Eutaw Street
Baltimore, Maryland 21217
Attorney for Society of Separationist, Inc., Amicus Curiae.

24 September 1969.

APPENDIX TO BRIEF

The following articles are of interest in reviewing the subject at issue:

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Hurvich, Fred A., "Religion and the Taxing Power," 35 University of Cincinnati Law Review 531, (1966).

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Korbel, "Do the Federal Income Tax Laws Involve an 'Establishment of Religion?' ", 53 American Bar Association Journal 1018 (1967).

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Note–"The First Amendment and Financial Aid to Religion: Limits on the Government's Conduct," 61 Northwestern University Law Review 777 (1966).

Note–"Taxation-Exemption of Charitable, Religious and Educational Institutions from Property Taxes," 12 Drake Law Review 87, Dec. 1962.

Note–"Taxation of Church Property," CCLXIII New Englander and Yale Review 177, Feb. 1892.

Note–"Taxation of Religious Organizations – Benefits Granted by Federal and State Governments," 5 Villanova Law Review 255, (1960).

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Religious Institutions and Values: A Legal Survey, 41 Notre Dame Lawyer 681 (1966).

Religious Institutions and Values: A Legal Survey, 43 Notre Dame Lawyer 684 (1968).

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No. 135

Opposition to Motion of Madalyn Murray O'Hair for leave to file brief, as amici curiae, as to O'Hair's filed on Sept. 25, 1969

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No. 135

In the

Supreme Court of the United States

OCTOBER TERM, 1969

FREDERICK WALZ,
Appellant,

v.

TAX COMMISSION OF THE CITY OF NEW YORK,
Appellee.

Appeal from the Court of Appeals of the State of New York

BRIEF OF THE BAPTIST GENERAL CONVENTION OF TEXAS AS AMICUS CURIAE

ROY L. COLE,
1511 Fidelity Union Life Building,
Dallas, Texas 75201.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
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NATURE OF THE CASE

The appellant seeks to have declared unconstitutional, as a violation of the First and Fourteenth amendments of the United States Constitution, a statute of the State of New York exempting from ad valorem taxation real property of churches owned and used solely for religious purposes.

INTEREST OF THE AMICUS CURIAE

A ruling by this court in favor of the appellant herein would have an astonishingly adverse effect upon the ability of this amicus curiae to carry on its educational, eleemosynary and charitable programs benefiting the public at large. These programs are extensive — for example, colleges and universities operated by this amicus curiae have an enrollment of over 15,000 students.

The Baptist General Convention of Texas is an association of churches whose members profess belief in the principles of the Southern Baptist denomination, the largest religious denomination in Texas, with 1968 membership of 1,842,333. These persons are embraced in 3,936 churches, which are completely autonomous but associate themselves as The Baptist General Convention of Texas for the accomplishment of missionary, educational, eleemosynary and charitable purposes which are beyond the resources of individual churches. Of course, the individual churches engage in their own charitable activities, in many cases embracing day-care for children, personal counseling, aid to the poor and underprivileged, study and recreational programs for young people and many other activities benefiting their communities at large.

The Southern Baptist churches of Texas, acting through The Baptist General Convention of Texas, own, support and (through various non-profit corporations the governing boards of which are elected by the Convention) operate the following institutions, all of them (with the sole exception

of Southwestern Baptist Theological Seminary, which provides post-graduate training for ministers) open to and serving people of all faiths and of no faith:

Colleges and Universities

Baylor University
Baylor College of Dentistry
Baylor School of Nursing
Dallas Baptist College
East Texas Baptist College
Hardin-Simmons University
Houston Baptist College
Howard Payne College
Mary Hardin-Baylor College
Southwestern Baptist Theological Seminary
University of Corpus Christi
Wayland Baptist College

Hospitals

Baptist Hospital of Southeast Texas
Baptist Memorial Hospital
Baptist Memorials Geriatric Hospital
Baylor University Hospital
Hendrick Memorial Hospital
Hillcrest Memorial Hospital
Memorial Baptist Hospital Systems
Valley Baptist Hospital

Orphanages

Buckner Baptist Boys' Ranch
Buckner Baptist Children's Home, Lubbock
Buckner Orphans Home
Mexican Baptist Children's Home
South Texas Children's Home
Texas Baptist Children's Home

Miscellaneous

San Marcos Baptist Academy
Buckner Baptist Maternity Home, Dallas
Buckner Baptist Maternity Home, San Antonio
Buckner Trew-Ryburn Complex for the Aging
Buckner Baptist Haven for the Aging
Buckner Child Care Service
Buckner Marriage and Family Counseling Center

The services of the individual churches to their communities are supported almost solely by voluntary contributions of the church members to the church budget. The institutional activities of the Convention are, of course, supported in part by tuition and service charges to those able to pay and by direct gifts from individuals and corporations. However, they are also strongly supported by grants from the Convention, which receives the money for these grants from the voluntary contributions of its member churches to the Convention's "Cooperative Program."

It is the intention of this brief to show statistically that the subjection to ad valorem taxation of church properties owned and used exclusively for religious purposes would inevitably cause such a serious decline in church contributions to the Convention's cooperative program as to result in the closing of the smaller institutions and serious curtailment in the activities of the larger ones, or their transfer to governmental control and consequent demands upon the taxpayers in general.

SOCIOLOGICAL ARGUMENT

All of the states exempt from ad valorem taxation the real property of churches owned and used exclusively for re-

ligious purposes, together with religious and secular hospitals, educational institutions and other institutions of eleemosynary purpose. Through its laws, the reports of its committees, and the official and private statements of its members, the Congress of the United States has without exception supported and affirmed the desirability of promoting private charity and philanthropy. Support of non-government educational and charitable efforts has been repeatedly affirmed by all the courts of this nation having occasion to consider the matter. This amicus curiae believes that it may assume that the charitable activities of its individual churches and its institutional eleemosynary and educational activities above detailed would be considered by the vast majority of the American people to be desirable and beneficial to the public as a whole.

We have referred to the amazing adverse effect that a ruling in favor of the appellant herein would have upon the ability of this amicus curiae to carry on its programs. Following this division of our brief is a chart showing the effect of subjection of their properties (owned and used exclusively for religious purposes) to ad valorem taxation on the twenty-five largest Southern Baptist churches in Texas and on a representative cross-section of smaller churches in one large city and a number of small towns widely distributed over the entire state. The key figures in analyzing this chart (which deals with the year 1968) are the amount of ad valorem tax to which each church would be subject, (1) considered as a percentage increase in the church budget and (2) com-

pared in dollar value with the gifts of that church to the cooperative program which supports the institutional activities of the Convention.

As a typical example from the chart, The First Baptist Church of San Antonio, Texas, if subjected to ad valorem taxation on its exclusively religious realty, would pay a tax of $57,220.00. Its 1968 annual budget (which corresponds with the contributions of its members) was $558,886.00. Of this amount, the church contributed $52,050.00 to the Convention's Cooperative Program. The church's annual costs for salaries, maintenance and all other expenses are, of course, constantly increasing. Its debt service requirements cannot be reduced. Indeed, practically the only way its members have of alleviating their rising burden of expenses is to reduce or eliminate their church's contributions to the Cooperative Program upon which Baptist institutional activities depend. Note that, without inflationary factors being considered, the subjection of its property to taxation would increase the church's budget by more than ten per cent, and in dollar amount substantially more than the entire contribution to the Cooperative Program. In a situation like this, it is hardly reasonable to suppose that the church members, themselves from all walks of life and burdened with their own problems of increased costs, would not feel it incumbent upon them substantially to reduce the provisions in the church budget for the Cooperative Program.

Certainly no reflection on the particular church is meant — all church members everywhere will of necessity have the

same concerns — the San Antonio church simply has a typical situation. Many churches would be in even worse shape — for example, The Rosen Heights Baptist Church of Fort Worth would have a budget increase caused by taxes of fifteen per cent, and the dollar amount of the taxes would be more than three times the amount of the church's total contribution to the 1968 Cooperative Program.

The totals for the twenty-five largest churches (which together accounted for almost 15% of the total 1968 Cooperative Program) indicate that 14.9% of their total budget was given to support Baptist educational, charitable and religious activities. Their taxes would amount to almost 12% of their budgets. The chart for the representative smaller Dallas churches shows that the tax would be slightly in excess of 10% of the total church budget, and would exceed the entire amount of their annual contribution to the Cooperative Program. For the churches in smaller population centers the tax would be slightly under 10% of the total budget and 44.37% of contributions to the Cooperative Program. Churches simply cannot increase their budgets by 10% and more (in addition to increases necessarily caused by rising costs, salaries and expansion and maintenance programs) — something has to give. The only possible place for reductions is in the eleemosynary and charitable activities of the churches which benefit the community as a whole.

There are, of course, many churches located in small towns and unincorporated areas. Effective tax rates would not be so high as in the city, but these churches are almost all three hundred members or less. These small churches, though numbering 2,374 out of a total of 3,936, contribute only 6.27% of the total Cooperative Program. Churches having five hundred members or less comprise 73% of the total churches, but contribute only 19.1% of the total Cooperative Program. The larger the church, the greater the support of the institutional program. The forty-five churches with more than 3,000 members contribute 21% of the total Cooperative Program contributions and these churches are, of course, in the large population centers with the highest effective tax rates. As a percentage of budget, churches with 3,000 or more members contribute 16.7% to the Cooperative Program, churches with 300 to 3,000 members average 12% of total budget, and churches under 300 members (the majority of the churches) contribute only 6.56% of their budget.

The total value of the real property of Southern Baptist churches in Texas owned and used exclusively for religious purposes is $553,000,000. According to United States Government figures, as quoted in the Texas Almanac for 1968, eight out of ten Texans live in metropolitan areas. A conservative estimate of an overall effective tax rate for this 80% is 2.10% of actual value. A conservative estimate for the re-

maining 20% is 1.25% of actual value. Applying these assumptions to total, the ad valorem tax for all Baptist churches in Texas would amount to $10,669,000, or over 81.5% of the total contributions of all churches to the 1968 Cooperative Program. It is obvious that the subjection of church properties to such taxes would necessarily result in tremendous decreases in Cooperative Program gifts. Our institutions, which, as mentioned, serve people of all faiths and of no faith, simply cannot stand such decreased support. The economic plight of non-government colleges and universities has been related and documented in hundreds or thousands of articles in the last few years. We can say that, in the case of our institutions, none of these articles have overstated the case. And our institutions other than colleges and universities are similarly always pressed for funds.

Our predictions of severe curtailment of institutional activities by reason of a subjection of church property to ad valorem taxation is supported not only by logic and the self-evident nature of the proposition, but also by extensive discussions with pastors and church members throughout the state.

At this point, we might mention that the figures given in our charts are highly conservative. In Texas, governmental agencies levying ad valorem taxes include the state, the county, the city, the school district, junior college dis-

tricts, hospital districts, flood control districts, road improvement districts, and a number of others. These districts set a dollars and cents rate based on a certain percentage of valuation. However, in practically all instances the percentage at which the taxing authority says it values property is not the same as the percentage at which it actually does value property, and in practically all of these cases the authority actually values property at less than it says. For example, a typical independent school district tax rate is $1.80 per $100.00 of value on (according to the district) 55% of value. Actually that district is more likely to be applying the tax rate to only 47.3% of value. A table of claimed and actual assessment ratios for each county, city and school district in Texas is prepared annually under the auspices of The Texas Tax Commissioners Association, The Utility Tax Commission of Texas and The Industrial Ad Valorem Tax Conference. In our chart we have used the actual, as opposed to the announced, assessment ratios. Further, we have made no projections on an increase to be expected in tax rates and valuation percentages, although it is a matter of record that ad valorem taxes are being steadily and substantially increased. Finally, we have probably overlooked an occasional hospital, mosquito control, or levee improvement district.

Twenty-five (25) Largest Southern Baptist Churches in Texas

Church	Value of Property	Church Budget	Gifts to Cooperative Program	Effective Tax Rate	Tax
First, Dallas	$ 7,750,000	$ 2,220,000	$ 217,000	2.05%	$ 158,875
First, Amarillo	3,117,000	966,600	219,000	2.00	62,340
First, Lubbock	3,600,000	681,900	115,000	1.78	64,080
First, San Antonio	2,860,000	558,900	52,100	2.70	57,220
First, Beaumont	2,285,000	545,500	77,400	2.35	78,975
Cliff Temple, Dallas	1,871,000	698,200	97,700	2.05	38,355
First, Wichita Falls	3,700,000	637,000	95,000	2.00	74,140
Travis Ave., Ft. Worth	3,540,000	507,300	54,700	2.20	77,800
So. Main, Houston	968,000	264,800	47,400	2.08	20,435
First, Midland	3,182,000	635,100	130,400	2.01	63,600
Broadway, Ft. Worth	3,187,000	637,100	87,800	2.20	70,114
Columbus, Waco	1,670,000	386,300	68,300	2.03	33,900
Second, Houston	3,875,000	592,800	34,700	2.08	80,600
First, Abilene	2,950,000	546,200	77,000	1.93	56,900
First, El Paso	1,850,000	323,600	64,500	2.22	41,070
First, Arlington	2,780,000	455,600	52,500	2.20	61,200
Park Cities, Dallas	4,600,000	986,000	137,500	2.05	94,300
Gaston, Dallas	2,160,000	404,000	50,200	2.05	44,280
Sagamore Hill, Ft. Worth	1,500,000	423,200	32,800	2.20	33,000
Hyde Park, Austin	1,753,000	364,500	23,100	2.06	36,100
Rosen Heights, Ft. Worth	1,730,000	260,700	12,200	2.20	38,100
First, Tyler	2,230,000	461,000	74,000	2.08	46,400
Trinity, San Antonio	2,920,000	446,600	35,900	2.70	79,000
First, Houston	1,830,000	409,000	33,500	2.08	38,100
Grace Temple, Dallas	1,310,000	313,400	6,500	2.06	26,000
Totals	$69,218,000	$12,728,810	$1,896,200		$1,474,884

Representative Big City (Dallas) Churches, 500 to 1500 Members

Church	Value of Property	Church Budget	Gifts to Cooperative Program	Effective Tax Rate	Tax
Royal Lane	$ 750,000	$ 95,000	$ 7,200	2.05%	$15,400
Royal Oaks	175,000	30,400	900	2.05	3,600
Lake Highlands	810,000	190,000	16,000	2.05	16,400
Pleasant Mound	171,000	51,200	5,500	2.05	3,500
Valwood Park	310,000	85,100	8,900	2.05	6,400
Total	$2,216,000	$451,700	$39,100		$45,300

Representative Churches in Smaller Population Centers, 500 to 1500 Members

Church	Value of Property	Church Budget	Gifts to Cooperative Program	Effective Tax Rate	Tax
First, Paris	$ 861,900	$ 226,800	$ 40,500	2.02%	$ 17,400
First, Athens	798,500	120,800	16,800	1.27	10,100
First, Marlin	272,000	78,900	8,300	1.21	3,500
First, Columbus	275,000	45,300	7,400	1.35	3,700
First, McAllen	939,000	168,500	5,300	2.08	19,500
First, Kerrville	500,000	102,000	12,300	1.91	9,500
First, Childress	355,000	93,500	24,600	1.09	3,900
First, Pecos	550,000	120,100	5,800	2.15	11,800
First, Brownfield	990,000	163,244	29,000	1.79	17,700
First, Brownwood	887,000	145,200	21,700	1.45	12,900
Total	$6,428,400	$1,050,700	$246,400		$109,000

LEGAL ARGUMENT

This amicus curiae respectfully takes the position that this case should be governed by *Murdock v. Pennsylvania*, 319 U.S. 105, 87 L. Ed. 1292 (opinion by Mr. Justice Douglas), in which a license fee on persons distributing religious literature was declared unconstitutional as prohibiting the free exercise of religion. The principles there stated should apply at least to property owned and used exclusively for religious purposes. We urge that position upon the

court, feeling that such an interpretation would not involve "an establishment of religion" but would instead be an assurance that the free exercise of religion would not be impaired or restrained.

However, the precise question actually before the court is not whether the United States Constitution prohibits a state from taxing exclusively religious property, but whether a state may, for reasons of public policy and the promotion of the public good, exempt exclusively religious realty, as it exempts the property of many secular organizations.

Every case finding a constitutional violation of the "establishment clause" or the "free exercise clause" has involved a state law where no possible reason for the statute other than governmental support of religion could be found. See *Engel v. Vitale*, 370 U.S. 421, 8 L. Ed. 2d 601 (the "required school prayer" case).

In the latest decision of this court bearing upon the matter, *Abington School District v. Schempp*, 374 U.S. 203, 10 L. Ed. 2d 844 (holding unconstitutional a school requirement for the reading of Bible verses and the recitation of the Lord's Prayer), Mr. Justice Brennan, concurring, pointed out:

> "Nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share benefits which government makes generally available to educational, charitable and eleemosynary groups. There is no indication that taxing authorities have used such benefits in any way to subsidize worship or foster belief in God. And as among

> religious beneficiaries, the tax exemption or deduction can be truly nondiscriminatory, available on equal terms to small as well as large religious bodies, to popular and unpopular sects, and to those organizations which reject as well as those which accept a belief in God." 374 U.S. 203, 301-2.

In the much-cited case of *Carmichael v. Southern Coal & Coke Company*, 301 U.S. 495, 81 L. Ed. 1245 (upholding the imposition of a state unemployment tax on employers), this court reiterated the long-standing principle that freedom to select subjects of taxation and to grant exemptions is inherent in the exercise of the power to tax, and that inequalities resulting from the singling out of one particular class for taxation or exemption infringe no constitutional limitation. Again, the same case points out that where the public interest is served, even one business may be left untaxed and another taxed. To the same effect is the recent case of *McGowan v. Maryland*, 366 U.S. 420, 6 L. Ed. 2d 393 (upholding a Sunday closing law with myriad exemptions, as advancing the welfare of the public, in spite of its religious origin). As said by Mr. Chief Justice Warren in the opinion of the court, "* * * a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." 366 U.S. 420, 426. This quotation, particularly taken in the context of the varied exemptions from the Sunday law involved, is especially appropriate in the case before this court. Surely a state is entitled to believe that places of religious worship, with their strong support of community charity and eleemosynary functions and state-wide hospitals, colleges, universities, orphanages and other institutions serving the public as a whole, are

entitled to exemptions from taxation for the good of the public as a whole.

The above proposition is reinforced by the observation of Mr. Justice Goldberg, concurring in *Abington School District v. Schempp*, as follows:

> "The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief. But devotion even to these simply stated objectives presents no easy course, for the unavoidable accommodations necessary to achieve the maximum enjoyment of each and all of them are often difficult of discernment. There is for me no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible.
>
> "It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.
>
> "Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion, and, indeed, under certain circumstances the First Amendment may require that it do so." 374 U.S. 203, 305-6.

Also significant is the decision of this court in *Eversen v. Board of Education*, 330 U.S. 1, 91 L. Ed. 711 (permitting state reimbursement for amounts expended in busing students to parochial schools), in which Mr. Justice Black stated for the court that the First and Fourteenth Amendments cannot be used to prevent a state "from extending its general state law benefits to all its citizens without regard to their religious belief." 330 U.S. 1, 16.

The elected representatives of the people of the 50 states surely cannot all be mistaken in their expressed belief that exemption of property owned and used exclusively for religious purposes redounds to the public benefit.

CONCLUSION

The appeal of Frederick Walz should be denied, and the judgment of the Court of Appeals of the State of New York should be affirmed.

Respectfully submitted.

ROY L. COLE,
Attorney for Amicus Curiae.

October 13, 1969

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TAX COMMISSION OF THE CITY OF NEW YORK,
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On Appeal from the Court of Appeals
of the State of New York

BRIEF AMICI CURIAE
of the
SYNAGOGUE COUNCIL OF AMERICA AND ITS CONSTITUENTS
(THE CENTRAL CONFERENCE OF AMERICAN RABBIS, THE RABBINICAL ASSEMBLY OF AMERICA, THE RABBINICAL COUNCIL OF AMERICA, THE UNION OF AMERICAN HEBREW CONGREGATIONS, THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, THE UNITED SYNAGOGUE OF AMERICA)

INTEREST OF THE *AMICI*

The Synagogue Council of America is a national coordinating body whose constituents include the national organizations representing the three branches of American Jewish religious life, Orthodox, Conservative and Reform. It is composed of six such organizations, as follows:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations;

Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;

United Synagogue of America, representing the Conservative congregations.

The Synagogue Council of America and each of its constituents are membership organizations. Congregational members of the constituents of Synagogue Council of America own property throughout the United States, including property within the State and City of New York, which is tax exempt because it is used for religious purposes. Rabbinical constituents of Synagogue Council of America are also concerned with the status of tax exemption for the property of congregations which they serve.

The concern of these *Amici* is not limited to the possible adverse financial effect that a decision invalidating tax exemption might have on its members who own such exempt property. These *Amici* also have a public and civic interest in the questions raised by this case.

Therefore, each of these *Amici* have studied and acted upon questions involving religion and the First Amendment for decades. And, where appropriate, these *Amici* have filed briefs *amicus curiae* in other cases related to such questions in state and federal courts, including the Supreme Court of the United States.

Even if the tax exemption in question is sustained, these *Amici* would not want the rationale of such a decision to weaken or impair constitutional rights or civil liberties in general, or the free exercise of religion or church-state separation in particular.

As a minority ethnic and religious group in the United States, the American Jewish community, including these *Amici*, has long felt that its ultimate security and protection resides in the extension of the widest possible protection of the civil and constitutional rights and liberties of all peoples and groups.

Beyond that, these *Amici* have concern as a matter of Judaism and religious conscience, that the reciprocal relationships of government and all religious bodies enable government and religion to coexist in an environment of freedom. This requires that religion and government be free of unconstitutional coercion or manipulation of one by the other.

In particular, these *Amici*, representing the religious groups of the American Jewish community, would be distressed by a finding in this case that held that the exemption of their property used for religious purposes was hurtful of desirable constitutional and social ends. In fact, we believe that such exemptions, properly viewed, are a positive contribution to vigorous civil and religious liberty, and should be sustained as such.

To urge this position, we have sought and obtained consent of the parties to the submission of this brief *amici curiae*.

STATEMENT OF THE CASE

Appellant's complaint alleges that he is a real property taxpayer in New York City. While Appellant describes himself as "a religious person not a member of any religious organization" (Jurisdictional Statement, P.3), he objects to the tax exemption of real property used exclusively for religious purposes, owned by religious organizations as violative of the First and Fourteenth Amendments of the Federal Constitution. Appellee's cross-motion for summary judgment dismissing the complaint was granted by the Supreme Court Special Term and affirmed in the Appellate Division and in the Court of Appeals. The case is before this Court as a result of an order noting probable jurisdiction upon application by the Appellant to reverse the decision of the New York courts and adjudge the exemptions in question as unconstitutional.

The statutory provisions in question are the following:

> New York State Constitution, Art. 16, Sect. 1:
>
> Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit.
>
> Real Property Tax Law of N.Y., Sect. 420, subd. 1:
>
> Real property owned by a corporation or association organized exclusively for . . . religious . . . purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section.

The decision below makes the point that, in finding favorably to the Appellees, the Court has sustained the exemption in question; has found that the statutes in question do not violate the First and Fourteenth Amendments of the Federal Constitution; and that "though the procedure used is technically infirm, decision is on the merits."

QUESTIONS PRESENTED

1. Do the statute and state constitutional provision in question violate the First and Fourteenth Amendments of the United States Constitution?

2. What is the constitutional character of the exemption in question?

   a. Un unconstitutional subsidy and establishment of religion?

   b. Within the discretion of the legislature to grant or deny?

   c. Declarative of a constitutional right of religious associations to hold property used for religious purposes free of ordinary taxation, in furtherance of religious liberty, separation of church and state and the free exercise of religion, guaranteed under the First and Fourteenth Amendments of the United States Constitution?

SUMMARY OF ARGUMENT

Not only is tax exemption of religious property not unconstitutional because of the First Amendment, but that very mandate requires such exemption within certain essential limits.

Viewed as a constitutional right rather than as an unconstitutional subsidy, tax exemption is a functional

recognition of church-state separation and the free exercise of religion.

As to separation, limited tax exemption is the reciprocal counterpart of the prohibition against the use of taxes to establish or support religion.

As to free exercise, the elimination of tax exemption of religious property would unconstitutionally abridge affirmative constitutional rights of religious freedom of persons and associations.

Therefore, the statute and state constitutional provision which the Appellant assails because of the First Amendment is, in fact, constitutional because of the First Amendment. For all practical purposes, state law should be upheld as declarative of the federal constitutional rights of associations and corporations which use certain property for religious purposes.

ARGUMENT

I.

A BILATERAL SEPARATION OF CHURCH AND STATE CONSTITUTIONALLY FORBIDS ORDINARY TAXATION UPON RELIGIOUS ACTIVITY OR PROPERTY IN RETURN FOR A RECIPROCAL PROHIBITION AGAINST GRANTS OF PUBLIC FUNDS ON BEHALF OF RELIGIOUS ACTIVITY OR PROPERTY.

Separation of church and state is an old doctrine which describes the permitted and prohibited constitutional relationship between religion and government. It is not a phrase which is found expressly written in the Constitution, but it is much more than a rhetorical expression as it has been applied and developed by the United States Supreme Court. Certain principles in its applica-

tion are, by now, clearly recognized: that the prohibition of religious establishment prohibits the establishment of religion in general, and is not solely directed to the prohibition of an established state church as such institutions were known in Europe, *Everson v. Board of Education,* 330 U.S. 1, 31-32 (1947); that church-state separation is not merely a functional aid to free exercise of religion, but is a principle of equal significance, *Engel v. Vitale,* 370 U.S. 421, 425 (1962); that church-state separation and free exercise, together constituting the constitutional system for guaranteeing religious liberty, are applicable to and incumbent commands on the state as well as the federal government, by virtue of the Fourteenth Amendment, *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940), *McCollum v. Board of Education,* 333 U.S. 203, 210-211 (1948); that religious liberty, including separation and free exercise, is designed to achieve a position for church and state which is independent of restraint, dominion, or subservience of one to the other, in the best interest of both, *Engel v. Vitale, supra* at 431 where the Court stated: "the first and most immediate purpose of the [Establishment Clause] rested on a belief that a union of government and religion tends to destroy government and degrade religion."

In *McCollum v. Board of Education, supra,* the concurring opinion of Justice Frankfurter described this as follows:

> Separation means separation, not something less. Jefferson's metaphor in describing the relation bebetween church and state speaks of a "wall of separation" not of a fine line easily overstepped . . . "the great American principle of eternal separa-

> tion"—Elihu Root's phrase bears repetition—is one of the vital reliances of our constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.
>
> We renew our conviction that "we have staked the very existence of our country on the faith that complete separation between state and religion is best for the state and best for religion." . . . If nowhere else, in the relation between church and state "good fences make good neighbors" . . . [citing *Everson*].

Decisions of the Court variously finding in favor of or against one or another religious practice or religious relationship between state and church always, since 1947, have reaffirmed this principle of the value of church-state separation to each side of the relationship. In *Engel v. Vitale, supra,* the Court said that its finding requiring the elimination of a prayer in the public schools does not "indicate a hostility toward religion. . . . the First Amendment was not written to destroy either religion or government."

Government, representing the taxing power in our society, stands at a peculiar distance from religion, that makes this relationship much different from the relationship that government has with other segments or elements in society. For example, government can aid or support many types of social or educational institutions which have a public purpose with the use of tax money, but "*no tax in any amount, large or small, can be levied to support any religious activities or institutions* . . .", *Everson v. Board of Education, supra* (emphasis supplied).

The reason for the prohibition was the separation of church and state. Everything in the history of that doctrine indicates that it is bilateral. Therefore, it should inevitably follow that no tax can be constitutionally levied by a state or subdivision upon religious property or activity to support government—that the taxing power cannot constitutionally extend to that peculiar sector or activity of society which is generally prohibited from receiving aid or grants from tax funds. In effect, these *Amici* contend that if the statute (New York Real Property Tax Law, Sect. 420, subd. 1) or the state constitutional provision that are in question here (New York State Constitution, Article 16, Sect. 1) were repealed or annulled, the First Amendment of the U.S. Constitution would nevertheless require New York to desist from taxation of property used for religious purposes.

Church-state separation and free exercise command neutrality on the part of government where religion is concerned. *Engel v. Vitale, supra*; *Abington School District v. Schempp,* 374 U.S. 203 (1963). Government must avoid "involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Sherbert v. Verner,* 374 U.S. 398 (1963).

II.

THE TAXATION OF PROPERTY USED FOR RELIGIOUS PURPOSES WOULD UNCONSTITUTIONALLY ABRIDGE THE FREE EXERCISE OF RELIGION

The power to tax has always been recognized as the power to control. Originally, in our history, it was thought of as the power to destroy. This doctrine was amended by Justice Holmes when he said that "the power to tax is not the power to destroy while this

Court sits," *Panhandle Oil Company v. Knox*, 277 U.S. 218, 223. But the potential controlling power of taxation in the hands of government is still a significant factor in consideration of religious liberty. See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Magnano Co. v. Hamilton*, 292 U.S. 40.

Murdock involved the right of the State to levy a substantial tax upon the right of an itinerant colporteur of religious literature and evangelism to sell his wares. That case held that such a sale was a protected activity under the First Amendment, and could not be taxed. There is dicta in the case to the effect that a non-discriminatory property tax laid against all property owners would be valid if assessed and collected against houses of worship. However, since 1943, there have been many subsequent cases involving religious liberty that have been decided by the Supreme Court. *Sherbert v. Verner, supra; Torcaso v. Watkins*, 367 U.S. 488 (1961); *Speiser v. Randall*, 357 U.S. 513 (1958); *Follett v. McCormick*, 321 U.S. 573 (1944); *Douglas v. City of Jeanette*, 130 F.2d 652 (3d Cir. 1942), affd. 319 U.S. 157 (1943).

The rationale of the *Murdock* case and those that follow indicate that the Court today should be much more sensitive to an interference with free exercise as would be represented by a tax on property used for religious purposes than it might have been when it hypothetically commented on the question more than twenty-six years ago. Yet, even then, in the *Murdock* case where the Court indicated that a non-discriminatory property tax on a conventional house of worship would be constitutional, the Court said:

> The power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance.

Murdock is often cited for the proposition that government can tax the preacher and the church, but not the right to preach or the right to religious exercise. These *Amici* contend that property used for religious purposes, including the house of worship, the religious sanctuary, and all that is contained therein are so intimately connected with religious exercise that to levy a direct tax upon the value of such property would constitute a tax on the exercise of religion, having the same effect as that tax upon the itinerant evangelist which the Court found unconstitutional in *Murdock*.

Associations of people, collected together for the expression in speech and action of protected rights under the First Amendment, are entitled to the protection of the First Amendment to the same extent as the individual members, acting alone, would be. *NAACP v. Alabama*, 357 U.S. 449 (1958). Thus, a church as a collective or corporate entity is entitled to the same protections of the free exercise of worship as individuals are.

What is the religious significance of a building or personal property used in religious exercise? This is a theological question which varies according to differences in religion, sect, and denomination, but the Court cannot ignore the fact that the exercise of much religious activity invests certain religious property itself with a particular religious sanctity, beyond and apart from its struc-

tural convenience.[1] The power of the state to tax such structures would represent a potentially devastating interference with their continued existence and the exercise of religion which takes place within their walls. "For there can be no doubt that the financial burden thus imposed would seriously curtail religious worship by many groups, to the point even of jeopardizing the existence of many churches." 49 *Colum. L. Rev.* 969, 989. See also 3 *Rutgers L. Rev.* 115, 123.

In a very practical way, any action of the legislature toward religiously used property except exemption would make religion an object of legislation and create various and sundry impacts and entanglements of church and state with the affairs of each other. The political arena would contain the potentialities for sale of church property by the government, discrimination between and among churches by the government, decisions by govern-

---

[1]The idea of a house of worship as a sanctified place might stem from the minutely detailed specifications for the construction of the ancient tabernacle described in the Book of Exodus, which served as a place of worship for the ancient Israelites in the wilderness and in Palestine before the construction of the Temple in Jerusalem. This ancient tabernacle is something in the form of a tent, which could be dismantled and moved from place to place as the people moved on. Nevertheless, it furnished the basic institution of worship, and permanent structures were a later development in Judaism, Christianity, and other faiths. In place, either as permanent or temporary structures, they are a part of religious exercise and not merely the place in which it occurs. Just as surely as the legislature cannot reach into the inside pocket of an itinerant colporteur, because that pocket and its contents represent religious exercise to him, so must the legislature be foreclosed from ever reaching into the house of worship, which is an essential ingredient in the exercise of religious activity more conventionally expressed.

ment based on religious rather than public considerations, and impairment of religious activity for inability of the church to meet financial obligations imposed by the government rather than those contracted by the church itself. The house of worship considered as an ordinary property taxpayer would be the indirect object of all legislation involving public expenditure and taxation levied in support of it. James Madison, in his *Memorial and Remonstrance against Religious Assessments,* deals with the danger to religious liberty where the legislature attempts to exact collection of taxes for the support of religion. However, his theory of the relationship between church and the legislature is equally applicable to the problem in this instant case.

> Because if religion be exempt from the authority of the society at large, still less can it be subject to that of the legislative body. The latter are but the creatures and vice regents of the former. Their jurisdiction is both derivative and limited; it is limited with regard to the coordinate departments, more necessarily is it limited with regard to the constituents. The preservation of free government requires not merely that the metes and bounds which separate each department of power may invariably be maintained; but more especially that neither of them be suffered to overleap the great barrier which defends the rights of the people.

It may be argued that fears of discrimination and abridgment of religious liberty are anticipatory of the effect of taxation upon protected religious activities under the First Amendment, which the Courts should not be called upon to deal with until they actually occur. However, in *NAACP v. Alabama, supra,* the Court recognized that a threatened or potential invasion of First

Amendment protection can be stopped before it actually occurs, even where the State does not intend that any unlawful abridgment will occur, because such invasions "may inevitably flow from varied forms of governmental action." Citing *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Court said:

> The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment.

III.

BY VIRTUE OF SEPARATION OF CHURCH AND STATE AND CONSTITUTIONALLY PROTECTED FREE EXERCISE OF RELIGION, PROPERTY USED FOR RELIGIOUS PURPOSES IS GENERALLY IMMUNE FROM THE TAXING POWER OF THE STATE.

The prohibition that these *Amici* urge against taxation of religious property is somewhat analogous in effect to the restraints on the taxing power that exists between the governments of our respective states and of the United States, as expressed in the United States Constition. However, the immunities are not of the same origin. The intergovernmental immunities exist in express language in the Constitution itself. The virtual immunity that these *Amici* urge in the instant case is the inevitable and proper consequence of decisions of the United States Supreme Court which withdraw religious activity from "the sphere of legitimate legislative concern and competence . . ." *McGowan v. Maryland*, 336 U.S. 420 (1961).

What are some of the boundaries of this virtual immunity from property taxes beyond legislative discretion which are claimed for religious property?

(a) The state may tax, or the legislature in its political discretion may exempt, property owned by religious institutions but not used for religious purposes. The right to tax or to exempt such institutions as hospitals, schools, social welfare agencies, homes for the aged, and other institutions and activities of civic and charitable purpose, lies in the legislative discretion, whether or not such institutions are operated by religious or secular organizations. *Asylem v. New Orleans*, 105 U.S. 362, 368 (1881); *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 696, 315 P2d 394, 409 (1957); *Millivard v. Paschen*, 16 Ill. 2d 302, 309, 157 N.E.2d 1, 5 (1959).

(b) If a religious institution owns property which it someday intends to put into use for religious purposes, but has not yet done so, such property *can* be subject to taxation, since taxation of such property does not interfere with religious exercise, if the legislature chooses to do so.

(c) The state may tax property used in non-related business activities of a commercial nature, even if such non-related commercial property is owned by a religious institution, since the immunity extends only to property used for religious purposes, and not to commercial property.

(d) Where the state constructs improvements, betterments, utilities, etc. that directly touch or benefit the property used for religious purposes and enhance the

value of the property on which it stands, the state can charge the church with the cost of construction or maintenance of such improvements, betterments, or utilities. Thus, the state can charge for streets, paving, water, sewer, and other appurtenances which it furnishes directly to a house of worship, which is a far different thing from taxing the house of worship to furnish general revenue for the overall cost of government. This is analogous to a permit fee or license fee which can be validly charged for the exercise of a protected religious activity where the fee has some relation to the direct cost which government incurs by virtue of the activity being carried on. On the other hand, government may not impose a fee on such a protected religious activity for the general purpose of collecting revenue. *Cox v. New Hampshire*, 312 U.S. 569 (1941).

Each of the foregoing areas are examples of the fact that these *Amici* are not claiming the broadest possible immunity for religious property. In each example, the legislature has constitutional discretion to tax or exempt religious organizations, so long as it exercises that discretion according to constitutional standards. It could not discriminate, in enacting taxes or exemption from taxes, between secular and religious groups where the property in question is used for a similar purpose. Thus, if non-profit hospitals are the issue, those owned by religious groups must be taxed or exempted in common with other non-profit hospitals. Nor could it discriminate between one religion and another. But within those limits of equal protection, the legislature has an area of discretion in collateral matters in this field, which, your *Amici* contend, it does not have where taxes on religious exercise or property used therefor are involved.

Many enterprises engaged in activities protected by the First Amendment are ordinary commercial businesses. Newspapers, television and radio stations, publishers, and others are in businesses which are producing and disseminating constitutionally protected material. The law is clear that no special tax can be levied on publications, but their owners are nevertheless liable for all ordinary and general taxes on a non-discriminatory basis paid by other businesses on their income or property. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

In *Baltimore v. A. S. Abell Company*, 218 Md. 273 (1958), a tax on advertising receipts of newspapers and broadcasting stations was invalidated as violative of the First Amendment, on the basis that taxing advertising touches the freedom of the press too closely. On the other hand, newspapers are required to comply with government regulations in the area of fair labor standards. *Oklahoma Press Publishing Company v. Walling*, 327 U.S. 186 (1946). Thus, it appears that taxes and other governmental regulations may be applied to a business engaged in a protected activity, but not to areas too near to the actual protected activity itself.

To the extent that a general non-discriminatory property tax is levied on property of religious institutions (except if it is exempted for some reason unrelated to religion), this same principle would apply. Rental properties, commercial businesses, land held for speculation or future use could be taxed constitutionally if the legislature chose to do so. Religious ownership or operation certainly does not, *ipso facto*, immunize them from taxation. But there is a distinction between religious activities and an ordinary commercial enterprise. In

Murdock v. Pennsylvania, supra, at P.115 (1943), the Court said:

> The fact that the ordinance is "non-discriminatory" is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position . . . but the mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights . . . are not to be gauged by standards governing retailers or wholesalers of books . . . it is plain that a religious organization needs funds to remain a going concern . . . Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way.

Just as a newspaper business is immune from a tax on the protected aspects of its commercial activity at the same time that it is subjected to general business taxes, so also can a religious institution be subjected to general property taxes on any property which it owns, *except that property intrinsically and directly related to the exercise of religion itself.* This is the basis for the analogy between the church or synagogue and the license tax on the sales made by the itinerant evangelist. This is the basis for the analogy between the protection af-

forded to property used for religious purposes and the protection from a specific advertising tax which the Court of Appeals of Maryland held to be unconstitutional in *Baltimore v. A. S. Abell Company, supra.*

To subject houses of worship to taxation on their property would be a serious invasion of their ability and, indeed, their right to exercise religious activity. It is not enough to say that we need not worry—that our synagogues and churches will not be taxed because state legislatures have decided not to do so. Implicit in that position is their right to change their mind someday. So long as exemption is discretionary, there is some plausibility in the argument of the Appellant that this represents an affirmative legislative decision that amounts to a subsidy. If our exemption is viewed in this light, it is called very seriously into question. Meanwhile, the area of valid legislative concern with religion has become very limited indeed and is increasingly becoming narrower. Legislative discretion can no longer justify the release of school children for religious instruction in churches during school hours. *McCollum v. Board of Education*, 333 U.S. 203. Nor can it afford a basis for allowing religious exercises in the public schools. *Engel v. Vitale*, 370 U.S. 421; *Abington School District v. Schempp*, 374 U.S. 203. Nor can it be the basis for a religious test for the office of a notary public. *Torcaso v. Watkins*, 367 U.S. 488. It can still afford a basis for laws requiring the closing of certain businesses on Sunday, but only because the Court has found that these laws are no longer religious in character. *McGowan v. Maryland*, 336 U.S. 420. In all of these cases, and in the language of a number of others, discretionary government action

in support of religious activity or religious standards has been proscribed as a religious establishment, and these *Amici* think that it has been properly proscribed as such.

It is in that other line of cases, dealing with free exercise, that this Court should find the rationale for continuing the exemption of houses of worship from taxation. There is much to fear, both as to the ultimate outcome of this case in particular and as to the potential for mischief with religious liberty in general, if this Court decides that the legislature or a state constitution *may* exempt property used for religious purposes from taxation. The rights and liberties of all will be far more secure if this Court decides, in effect, that the very First Amendment which the Appellant has invoked to assail the exemption affords the surest basis for sustaining it. The exemption of the religious sanctuary is not any longer a legislative option; it has become a Constitutional mandate.

CONCLUSION

For the reasons set forth herein, the *Amici* urge that the judgment of the New York Court of Appeals be affirmed.

MARVIN BRAITERMAN
Baltimore, Maryland
Attorney for Amici

I. CYRUS GORDON
HENRY A. RAPAPORT
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1969

No. 135

FREDERICK WALZ,

Appellant,

against

TAX COMMISSION OF THE CITY OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

APPELLEE'S BRIEF

J. LEE RANKIN,
Corporation Counsel,
Counsel for Appellee,
Municipal Building,
New York, New York 10007.

STANLEY BUCHSBAUM,
EDITH I. SPIVACK,
ROBERT C. DINERSTEIN,
of Counsel.

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IN THE

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No. 135

FREDERICK WALZ,

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TAX COMMISSION OF THE CITY OF NEW YORK,

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On Appeal from the Court of Appeals of the State of New York

APPELLEE'S BRIEF

Statement

This is an appeal from a final judgment of the New York Court of Appeals (R. 35-37, 24 NY 2d 30, 246 N.E. 2d 517 [1969]),* affirming a unanimous judgment of the Appellate Division, First Department of the Supreme Court of the State of New York (R. 30-31, 30 A D 2d 778 [1969]), which affirmed, without opinion, a memorandum determina-

* References designated "R." refer to the Appendix filed in this Court.

tion of the Special Term of the Supreme Court of the State of New York (R. 26).

On June 16, 1969, this Court noted probable jurisdiction (395 U.S. 957).

Question Presented for Review

Whether tax exemptions for real property owned by a religious corporation and used exclusively for religious purposes, as provided by a statute incorporating long accepted public policy, are prohibited by the First and Fourteenth Amendments of the United States Constitution?

The Facts

The action was commenced on June 15, 1967, by the service of a summons and verified complaint upon the Tax Commission (R. 3-7). The Tax Commission served a verified answer containing three separate and distinct defenses on June 28, 1967 (R. 9-10). Thereafter, plaintiff moved for an order striking out defendant's answer and directing the entry of summary judgment for plaintiff upon the cause of action set forth in the complaint (R. 11-17). The defendant opposed the motion and also requested summary judgment dismissing the complaint (R. 17-21). Plaintiff submitted an affidavit in reply (R. 22-23).

In essence, the pleadings relate that plaintiff, as attorney *pro se*, is a citizen of the United States and the owner in fee of real property located in the County of Richmond,

designated on the Tax Map as Section 1, Block 198, Lot 210 (R. 5). His complaint is that the tax exemption granted to religious corporations for real property owned and used by them for religious purposes for the tax year commencing July 1, 1967, "constitutes an involuntary payment by plaintiff to the aforementioned religious organizations, in violation of plaintiff's right of religious freedom" and confiscates his property "without due process of law, in violation of the provisions of the Constitution of the United States of America." (R. 6).

The Tax Commission answered that the taxable status of real property owned by religious corporations was determined in accordance with the law appertaining thereto and that the plaintiff was neither aggrieved thereby nor deprived of any rights sufficient to state a cause of action (R. 9, 19).

Opinions Below

The Appellate Division, First Department of the Supreme Court of the State of New York, unanimously affirmed, without opinion (R. 30, 31), the decision of the Special Term, upholding the constitutionality of the statute in question, which stated in part:

> "Such exemptions are granted in pursuance of long-standing public policy of this State, under a statute which is presumptively constitutional, and which is hereby sustained." (R. 25).

The New York Court of Appeals affirmed (R. 38-39), stating in relevant part:

> "Firmly embedded in the law of this State, both by Constitution (art. XVI, §1) and by statute (Real Property Tax Law, §420), is the doctrine that real property owned by a religious corporation and used exclusively for religious purposes is exempt from taxation (see, e.g., *People ex rel. Watchtower Bible & Tract Soc.* v. *Haring*, 8 N Y 2d 350, 357-358; *People ex rel. Church of St. Mary* v. *Feitner*, 168 N. Y. 494, 497) and research discloses—and the 2½ page brief of the plaintiff-appellant herein cites no authority to the contrary—that courts throughout the country have long and consistently held that the exemption of such real property from taxation does not violate the Constitution of the United States. (See, e.g., *Trustees of Griswold College* v. *State of Iowa*, 46 Iowa 275, 282 [1877]; *Methodist Episcopal Church, South* v. *Hinton*, 92 Tenn. 188 [1892]; *Garrett Biblical Institute* v. *Elmhurst State Bank*, 331 Ill. 308 [1928]; *Lundberg* v. *County of Alameda*, 46 Cal. 2d 644, app. dismd. 352 U. S. 921 [1956]; *General Finance Corp.* v. *Archetto*, 93 R.I. 392, app. dismd. 369 U. S. 423 [1962]; *Murray* v. *Comptroller of the Treasury*, 241 Md. 383, cert. den. 385 U. S. 865 [1966]; see, also *Abington School District* v. *Schempp*, 374 U. S. 203, 301 [*per* Brennan, J., concurring [1963]]. But see, contra, *Engel* v. *Vitale*, 370 U. S. 421, 437, *per* Douglas, J., concurring [1962].) We see no reason for departing from this conclusion in this case."

Constitutional Provisions and Statute Involved

The First Amendment of the Constitution of the United States provides, in pertinent part, as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

Section 1 of Article 16 of the New York Constitution provides, in pertinent part, as follows:

> "§1. [Power of taxation; exemptions from taxation]
>
> Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit."

Section 3 of Article 11 of the New York Constitution provides as follows:

> "§3. [Use of public property, etc. or money in aid of denominational schools prohibited; transportation of children authorized]
>
> Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the

legislature may provide for the transportation of children to and from any school or institution of learning."

The New York Real Property Tax Law, Section 420, subd. 1, provides, in pertinent part, as follows:

"§420. Non-profit organizations

1. Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, library, patriotic, historical or cemetery purposes, for the enforcement of laws relating to children or animals, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section * * *."

Summary of Argument

I. The Court should dismiss the cause of action or affirm the Court below.

The record presented to this Court is inadequate to support a proper review of the important constitutional issue raised in this case. In this posture, the appropriate disposition is the dismissal of the cause of action or affirmance of the judgment of the Court below.

The lack of an adequate record is particularly significant because of the nearly 200-year history of the policy of exempting church property from taxation which is here

challenged. Every state in the Union has a statute or constitutional provision granting such exemptions.

Further, the state courts which have ruled on the issue have uniformly upheld these exemptions. Where appeals from those decisions have come before this Court, they have been dismissed for lack of a substantial federal question or certiorari has been denied.

II. Property tax exemptions for religious institutions are not prohibited by the religion clauses of the First Amendment.

A. There is nothing in the history of the religion clauses of the First Amendment which reveals an intent to bar the tax exemptions under consideration. In fact, the background of those exemptions is rooted in the same history that led to the adoption of the principle of separation of Church and State.

In Virginia, for example, a tax statute was passed in 1800, while James Madison was a member of the General Assembly, which provided for exemption for "houses of divine worship". This was just one year after the passage of a complete disestablishment statute. The District of Columbia passed a tax ordinance which exempted church property in 1802, while Thomas Jefferson was President. The New York experience was similar in that an exemption from property taxation for churches was enacted only a few years after the repeal of colonial statutes designating the Episcopal Church as the established church in several counties in the state.

B. Tax exemptions are consistent with the legislative and judicial policy of neutrality which has characterized separation of Church and State in this country.

Exempting church property used for religious purposes from taxation is not the equivalent of direct subsidy to religion. Subsidies must, of necessity, be unequal in their effect. Exemptions have an equal economic effect on all sects and thus further neutrality by minimizing government involvement in religion.

Just as subsidies cannot be equal, so taxation similarly would impose an uneven burden on the various sects and individual churches.

C. Elimination of exemptions for religious properties would be inconsistent with the treatment afforded other non-profit charitable institutions. The policy in New York, as elsewhere, is to exempt the property of virtually all such organizations from taxation when it is used accordingly.

Taxing church properties would be an unwarranted deviation from this policy which would destroy neutrality. Exemptions given churches as part of the broader classification of public welfare institutions have been upheld by the courts, which have found this uniformity of treatment to be constitutional.

The argument that the secular public welfare policy does not justify exemptions for church property used only for religious purposes is unrealistic. The dual role of the church as religious organization and as private charitable institution cannot be separated for purposes of tax policy.

III. The State may exempt a category of persons from a valid secular law based on religious considerations.

This Court has previously upheld exemptions from general secular laws based on religious considerations without finding such exemptions to constitute an establishment of religion.

This has been the holding where it was found that failure to exempt from the operation of the law would result in a violation of the Free Exercise Clause. But such exemptions have also been sustained where, as a matter of "legislative grace", classifications have been made on religious grounds.

POINT I

In view of the inadequate record presented in this case, the Court should either dismiss the cause of action or affirm the Court below.

In light of the manner in which the constitutional issue under the First and Fourteenth Amendments has been presented in this case, the appropriate disposition is the dismissal of the cause of action or the affirmance, on the merits, of the decision of the New York Court of Appeals.

Such a result is impelled by (a) the lack of an adequate record upon which to base a proper review of the broad constitutional issue raised; (b) the pervasive impact of a reversal of almost 200 years of an undisrupted public policy; (c) the unbroken line of state court decisions up-

holding the constitutionality of the exemptions; and (d) the tacit acceptance of those results by this Court.

This Court has traditionally declined to establish constitutional precedent on an inadequate factual base. Last year, therefore, the Court affirmed the decision of a Texas County Court, sustaining a public drunkeness charge, on the ground that:

> "the record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide-ranging new constitutional principle. * * * The trial hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases." (*Powell* v. *Texas,* 392 U. S. 514, 521-22 [1968]).

In *Poe* v. *Ullman,* 367 U. S. 497, 501, 509 (1961), after noting probable jurisdiction (362 U. S. 987 [1960]), this Court dismissed an appeal from the highest court of Connecticut which sought a declaratory judgment that certain Connecticut statutes prohibiting the use of contraceptives were unconstitutional. Mr. Justice Frankfurter, speaking for the majority, cited the "lack of immediacy of the threat described", and Mr. Justice Brennan in his concurring opinion questioned the existence of a substantial controversy in light of the "skimpy record" (see, also, *Kimbrough* v. *United States,* 364 U. S. 661 [1961]; *Ellis* v. *Dixon,* 349 U. S. 458 [1955]).

Lack of a substantial record, lack of clarity in presenting the question in this case, and appellant's failure to demonstrate the manner in which he has suffered the injury alleged preclude the analysis required by the issue raised.

There is nothing in the record or in appellant's brief to indicate the basis on which this Court should reverse the legislative policy of New York and every other state in the Union. There is neither a discussion of the constitutional basis of the alleged injury, nor a factual showing that such injury has occurred. As this Court admonished in *Poe*:

> " 'The party who invokes the power [to annul legislation on grounds of its unconstitutionality] must be able to show not only that the statute is invalid but that he has or is immediately in danger of sustaining some direct injury as a result of its enforcement. * * *' *Massachusetts* v. *Mellon,* 262 U. S. 447, 488." (367 U. S. at 504-5).

As in *Powell* and *Poe,* this Court is being asked in the case at bar, to decide a unique and important constitutional question of wide impact which should not be resolved on the basis of the inadequate record presented.

The exemption from taxation of property owned by a religious organization and used by it for religious or other purposes enumerated in the exemption statute, represents an uninterrupted policy in this country beginning in colonial times, see pp. 14-18, *infra.* The practice of granting exemptions, first sanctioned as a matter of historical custom, received statutory or constitutional legitimacy in the various states after the disestablishment of state-supported churches. Continuing, therefore, as a matter of legislative policy in every state and the District of Columbia, religious property exemptions have played an integral part in the public policy of New York as well. The role of religious organizations as private charitable associations, in furthering the secular objectives of the State, has become a fundamental concept in our society and has been recog-

nized by the legislature and courts of New York. *People ex rel. Watchtower Society, Inc.* v. *Haring,* 8 N Y 2d 350 (1960).

In those cases in which state courts have been called upon to decide the constitutionality of tax exemptions for church property, they have uniformly been sustained. See, *e.g., Trustees of Griswold College* v. *State of Iowa,* 46 Iowa 275 (1877); *Yale University* v. *Town of New Haven,* 71 Conn. 316, 42 A. 87, 92 (1899); *Commonwealth* v. *Y.M.C.A.,* 116 Ky. 711, 719, 76 S.W. 522, 523 (1903); *St. Barbara's R.C. Church* v. *City of New York,* 243 App. Div. 371, (2nd Dept., 1935); *Reynolds* v. *Nusbaum,* 19 Wis.2d 148, 115 N.W.2d 761 (1962).

Of four recent cases involving property or other tax exemptions to religious organizations brought before this Court, three [*General Finance* v. *Archetto,* 93 R.I. 392, 176 A.2d 73 (1961), *dism.* 369 U. S. 463 (1962); *Lundberg* v. *County of Alameda,* 46 Cal. 2d 644, 298 P.2d 1 (1956), *dism. sub. nom. Heisy* v. *County of Alameda,* 352 U. S. 921 (1956); *Swallow* v. *United States,* 325 F.2d 97 (C.A. 10th Cir. 1963), *dism.* 377 U. S. 951 (1963) (I.R.C. exemptions)] have been dismissed for lack of a substantial federal question, and in one [*Murray* v. *Comptroller,* 241 Md. 383, 216 A.2d 897 (1966), *cert. den.* 385 U. S. 816 (1966)] certiorari was denied. In all of the above cases the issue of the constitutionality of the exemptions was resolved in the state courts squarely in favor of the state or federal policy. In *Lundberg, supra,* for example, the Supreme Court of California said:

> "The principle of separation of church and state is not impaired by granting tax exemptions to religious

groups generally, and it seems clear that the First Amendment was not intended to prohibit such exemptions." (298 P.2d at 8).

A dismissal for lack of a substantial federal question is regarded as a decision on the merits, with the full force and effect of precedent. *Ohio ex rel. Eaton* v. *Price,* 360 U. S. 246 (1951) (mem. of Brennan, J., at 248); see, also, FRANKFURTER and HART, *The Business of the Supreme Court at October Term, 1934,* 49 HARV. L. REV. 68, 77 (1955).

There is a 200-year history of the granting of the challenged tax exemptions which have become a fundamental part of the states' public welfare policy. There is the unblemished precedent in the decisions of state courts and of this Court, in cases challenging the exemption, of support for it. In light of this posture and the inadequate record upon which this case is brought, the Court should dismiss the cause of action or affirm the Court below. As the Court noted in *Parker* v. *Los Angeles County,* 338 U. S. 327, 333 (1949):

"The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."

POINT II

The inclusion of real property owned and used for religious purposes among other specified exemptions from real property taxation does not constitute a "law respecting an establishment of religion."

A. Property tax exemptions are rooted in the same history as the Establishment Clause.

Property tax exemptions of church property are firmly embedded in the public policy of every state in the Union and the District of Columbia. The practice is both universal and continuous in our history. Today, provision for such exemptions may be found in a state's constitution, its statutes, or both, as in New York. See, generally, Note, *Constitutionality of Tax Benefits Accorded Religion,* 49 COL. L. REV. 968 (1949); PAULSEN, *Preferment of Religious Institutions in Tax and Labor Legislation,* 14 LAW & CONTEMP. PROB. 144 (1950); VAN ALSTYNE, *Tax Exemption of Church Property,* 20 OHIO ST. L.S. 461 (1957).

While the long history of the practice is not determinative of its constitutionality, it is of considerable significance. Particularly relevant is the fact that soon after the adoption of the separation principle in the First Amendment and in early state statutes, both the federal government and the states reaffirmed their acceptance of the policy of exempting church property from taxation. And neither the adoption of the Fourteenth Amendment, nor the explicit application of the religion clauses of the First through the Fourteenth Amendment (See *Cantwell* v. *Connecticut,* 310 U.S. 296 [1940]), have resulted in a disruption of prior state policies regarding exemptions.

Thomas Jefferson and James Madison were the leaders in the fight to ensure religious liberty and disestablishment. The details of their successful struggle to accomplish this in Virginia are set forth in Mr. Justice Rutledge's dissenting opinion in *Everson* v. *Board of Education,* 330 U.S. 1, 33 *et seq.* (1947). See, also, 2 BRANT, JAMES MADISON, XXII (1956). Their purpose was achieved in the main by the adoption of the religion clause in Virginia's Declaration of Rights of 1776 and the enactment of Jefferson's Bill for Establishing Religious Freedom in 1786. A final and significant step was the enactment on January 24, 1799, of a statute which repealed various laws which, by inference or reference, recognized the Church of England as an established church (*Virginia Statutes at Large,* Shepherd's Continuation of Hening, vol. II, 149). Nevertheless, just one year later a Virginia statute imposing taxes was passed, which exempted the real property of "houses of divine worship." *Id.,* at 200. At that time Madison was still a member of the Virginia General Assembly.

It should be noted that the religion clauses of the First Amendment have been said to have been designed to provide for the nation the protection which had already been provided for Virginia. See *Everson,* 330 U.S. 1, 39 (Rutledge, J., dissenting). See, also, *McGowan* v. *Maryland,* 366 U.S. 420, 464-465 (1961) (Frankfurter, J., concurring).

Perhaps even more important is what occurred in the District of Columbia. It seems clear that the District is subject to the same constitutional limitations as the federal government and that, therefore, unlike the states, it was

clearly subject to the religion clauses of the First Amendment from the outset. See, *e.g., Capitol Traction Company* v. *Hof,* 174 U.S. 1, 5 (1899); *Wight* v. *Davidson,* 181 U.S. 371, 384 (1901); *Bolling* v. *Sharpe,* 347 U.S. 497, 498-499 (1954); *Neild* v. *District of Columbia,* 110 F.2d 246, 249-251 (D.C. Cir. 1940). Yet in 1802, at a time when Jefferson was the President, a tax ordinance was adopted by the corporation of the City of Washington, under authority delegated by Congress, which exempted, among others, "houses of public worship." (Act of October 6, 1802, ch. 5, ROTHWELL'S LAWS OF THE CITY OF WASHINGTON, 20 [1833]).

The New York experience has been similar. In 1777 the legislature abolished all tax laws dealing with religious maintenance, but continued the tax exemption as a matter of public policy (ADLER, HISTORICAL ORIGIN OF THE EXEMPTION OF CHARITABLE INSTITUTIONS, 76 [Westchester Chamber of Commerce, 1922]).

By 1784 New York was achieving real separation by repealing the colonial acts designating the Episcopal Church as the established church in several counties of the state (Chap. 38 of the Laws of 1784). Yet, the first general tax statute, Laws of 1801, Chapter 17, section 24, which provided for the assessment and collection of taxes upon real and personal property, also stated:

> "That no house or lands belonging to the United States, or to the people of this State, nor any church or place of public worship, nor any personal property belonging to any minister of the gospel or to any priest of any denomination whatsoever, nor any real estate of such minister or priest not exceeding in value one thousand five hundred dollars, nor any college

> or incorporated academy nor any school-house, court-house, gaol, alms-house or property belonging to any incorporated library shall be taxed by any law of this State."

The state's modern legislative history indicates how thoroughly exemption of church property has become a basic tenet of its public policy. At the Constitutional Convention of 1915, a proposition was introduced to repeal all tax exemptions, including those to religious institutions. This was defeated by a vote of 102-13. The reasons given were the deep-rooted tradition, and the fear that religious property would be sold for non-payment of taxes, an idea the legislators found repugnant (Journal of the N.Y.S. Constitutional Convention, 1915, Vol. II, 2227-34).

Repeal of exemptions was again introduced at the Constitutional Convention of 1938, and again defeated—this time in committee. In its report, the Committee on Taxation recommended the grant, repeal or amendment of exemptions by general laws only. However, exemptions for religious, charitable or educational institutions became a matter of constitutional mandate, rather than legislative discretion. That report stated in part:

> "Those corporations are discharging social obligations which the state would otherwise have to assume and are reasonably entitled to constitutional protection in the exemptions granted to them with respect to that property essential to the operation of their work." (Journal of the N.Y.S. Constitutional Convention, 1938, REPORT OF THE COMMITTEE ON TAXATION, Doc. #2, p. 2).

The statutory history of religious property tax exemptions is so closely juxtaposed to that of disestablishment

in this nation's formative period that it is difficult to believe that the former could have survived if considered inconsistent with the latter. The bitter experience of the colonists under religious oppression would have foreclosed such a possibility. The evolution of the secular rationale that churches performed many beneficial public functions merely reinforced the philosophical consistency of the two concepts. Thus, from the beginning of our nation, the tax exemption of church property has been regarded as consistent with the principles of disestablishment.

That this historical evolution is, in fact, consistent with the fundamental principles of separation is the reason that the term neutrality is most often used to characterize that principle. The religious guarantees of the First Amendment were intended both to preserve civil liberty from interference by religious institutions and to prevent the incursion of the state into the area of religious worship (*Everson* v. *Bd. of Education,* 330 U.S. 1, 15 [1947]; Howe, The Garden and the Wilderness, 1-31 [1965]).

B. In practice exemption promotes the same goals as the Establishment Clause.

The mere existence and acceptance of a practice for a prolonged period is, of course, not determinative of its constitutionality. However, when a practice has been accepted by the drafters and supporters of a constitutional provision and has continued to be accepted generally for close to two centuries, it should not be found unconstitutional in the absence of the most compelling reasons for reaching such a result. There are no such reasons. Certainly the appellant has advanced none.

The long established and accepted practice should not be overthrown unless the passage of time has shown that it threatens to promote the consequences which the religion clauses were designed to prevent. See *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 236 (1963) (Brennan, J., concurring). History has shown, however, that these tax exemptions have not tended to defeat the aims of the religion clauses, nor have they in any way disturbed the neutrality between Church and State sought by the First Amendment's drafters.

Those who urge unconstitutionality do not rest their argument on the basic reasons for the adoption of these clauses in the First Amendment. Instead they rely on a syllogism. It is improper, they say, for a state or the national government to raise money for or to pay money to any or all churches. A tax exemption reduces the amount of moneys which churches must expend and, therefore, is an indirect equivalent of payment of moneys to the churches. Hence, the exemptions are invalid. See, *e.g.*, Note, 49 COL. L.REV. 968, 985 (1949).

However, exemptions are not universally regarded as the equivalent of subsidies. See BITTKER, *Churches, Taxes and The Constitution*, 78 YALE L.J. 1285 (July 1969); GIANNELLA, *Religious Liberty, Non-establishment, and Doctrinal Development*, 81 HARV. L. REV. 513 (1968); FREUND, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1687, fn. 16 (1969). Professor Giannella, for example, finds exemptions essential to maintaining separation, in that:

> "to the extent that a church's income depends on free will offerings, exemption serves to preserve volunta-

> rism. We have here a fundamental economic difference between appropriating revenues for churches and failing to send them tax bills. In the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches. In the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions." (81 HARV. L. REV. at 553).

Underlying this analysis is Giannella's recognition that a property tax is something other than a mere benefit tax (81 HARV. L. REV. at 552). Thus, payment of an *ad valorem* property tax by a religious organization would mean the diversion of funds contributed for a religious purpose to support a secular system from which the religion clauses of the First Amendment had intended such organizations to remain apart.

In support of the proposition that government subsidy must, *per se*, violate the principle of separation, is the realization that regardless of the intent, any such aid would necessarily favor one sect over another.* As Edmond Cahn has rightly observed:

> "* * * Madison submitted most astutely, the rights of conscience must be kept not only free but *equal* as well. And in view of the endless variations—not only among the numerous sects, but also among the organized activities they pursued and the relative emotional values they attached to their activities—how could any species

* It should be noted that while the policy of granting property tax exemptions to religious institutions is universal amongst the states, most states also have constitutional or statutory provisions prohibiting any form of direct subsidy of religious institutions (*e.g.*, N. Y. Const., Art. 11, §3; see, generally, 49 COL. L. REV. at 990, fn. 146).

> of government assistance be considered genuinely equal from sect to sect? If, for example, a state should attempt to subsidize all sectarian schools without discrimination, it would necessarily violate the principle of equality because certain sects felt impelled to conduct a large number of such schools, others few, others none. How could the officers of government begin to measure the intangible factors that a true equality of treatment would involve, i.e., the relative intensity of religious attachment to parochial education that the respective groups required of their lay and clerical members?" (CONFRONTING INJUSTICE, *"The 'Establishment of Religion' Puzzle,"* 186-87 [1962]).

Thus, in the calculus of separation, direct aid tends to destroy neutrality whereas no-aid preserves neutrality. It is submitted that this dichotomy is equally valid in assessing the propriety of the property tax exemption.

In New York, as in most states, both ownership and exclusive use for religious purposes are required for church property to be eligible for tax exemption (N.Y. Real Property Tax Law, §420(1); Note, 49 COL. L. REV. at 974). The only contact between government and church in this area at present comes in the fairly simple process of determining eligibility for exemption. To tax religious property may result in much greater government involvement. As pointed out at an early New York State constitutional convention (p. 17, *supra*), the state may find it necessary to sell church property to satisfy delinquent tax payments. While the possibility of foreclosure of churches which would arise if they were subject to taxation may not be sufficient to invalidate such taxation as an in-

terference with the free exercise of religion, it does involve an element of interference with free exercise which should be avoided.

In an urban area, for example, a church located in a ghetto neighborhood may have a comparatively low assessed value. But in absolute terms, the ensuing tax burden might prevent its continued existence. A wealthier congregation, on the other hand, might still be able to support its house of worship despite a heavier tax burden. Exemption from taxation permits all churches to co-exist on an equal basis. Their prosperity, both material and spiritual, is dependent only on their members, as Mr. Justice Douglas has remarked (*Schempp, supra,* 374 U.S. at 229). Taxation of church property would permit the state to introduce an extraneous and wholly secular factor, which though intended to be nondiscriminatory, would impose an unequal burden on the various religions and congregations within those religions.

C. Elimination of property tax exemption would treat churches differently from other non-profit charitable institutions.

The conclusion that churches must be taxed despite the granting of exemptions or the inapplicability of the tax to other non-profit charitable organizations, would incorporate into the religion clauses a requirement that churches must pay taxes whereas all others in the same overall class need not. Such a result does not accord with the view that those clauses were designed to require neutrality toward churches and religions.

The similar treatment of the Church and other public welfare organizations is a persistent fact. It is a very real

part of the history of property tax exemptions and reflects the practical realization that the church *qua* church and church *qua* non-profit, charitable institution are logically inseparable for purposes of tax policy. The long history and uniformity of treatment among the states on the policy of these tax exemptions, as Professor Kauper notes (*The Constitutionality of Tax Exemptions for Religious Activities* in THE WALL BETWEEN CHURCH AND STATE, at 110 [1963]):

> "suggests a rationally conceived and deep-seated policy, and not an accidental or vestigial survival of outmoded practices."

This view is particularly pertinent to the case at bar. Churches are only one of a great variety of non-profit organizations which qualify for exemption under the New York Real Property Tax Law. Under Section 420 of that law, exemption is also provided for non-profit organizations set up for the following purposes: moral or mental improvement of men or women; charitable; hospital; educational; public playground; scientific; literary; bar associations; medical society; library; patriotic; historical; cemetery; and for the enforcement of laws relating to children and animals. Other sections in Article 4, Title 2, of that law provide exemptions for a number of other non-profit organizations. These include, among others, opera houses (§426), fraternal organizations (§428), academies of music (§434), veterans' organizations (§452), pharmaceutical societies (§472), and dental societies (§474). That there has been no attempt to single out the Church for grant of favor is clearly shown by the extent to which exemptions have been provided for non-profit corporations. The elimination of exemptions for church properties would be a

departure from the policy of neutrality and would be inconsistent with the principle of separation.

One basis for the tax exemptions granted to religious properties is the recognition of the Church's role in carrying on public welfare activities. In fact, it has been suggested that the Church's social welfare role was an essential element in Madison's concept of that principle. As Professor Cahn submits in CONFRONTING INJUSTICE, at 188:

> "Recognizing organized religion as an ongoing social institution, Madison was much too realistic to overlook the influence it can exert on the general welfare. He proceeded to argue an excellent secular case, proving that here too the establishmentarians were completely mistaken. Religion in a society could indeed serve the general welfare, but government support of religion could only serve the forces of resentment and hatred. Religion could be solidary, but government assistance could be only divisive."

See, PFEFFER, CHURCH, STATE AND FREEDOM, 173 (1953); 1938 N.Y. Constitutional Convention, REPORT OF THE COMMITTEE ON TAXATION AND FINANCE, Chap. X, *Tax Exemptions Under the General Property Tax*, 212-13.

The public policy of exempting religious organizations from property taxation for their charitable and public welfare activities has been sustained in the decisions of this Court and those of the states in which the exemptions were challenged. The public policy of furthering the secular programs undertaken by the various churches through tax exemptions, has usually been considered by the courts as a part of, and consistent with, the principle of neutrality. Usually the issue of tax exemptions to churches, is treated

together with, and compared to, treatment of other private charitable and non-profit organizations, and is discussed in the context of reasonableness. See, *e.g.*, *Fellowship of Humanity* v. *County of Alameda*, 153 Cal. App. 2d 673, 696, 315 P.2d 394, 409 (1957); *Milward* v. *Paschen*, 16 Ill. 2d 302, 309, 157 N.E. 2d 1, 5 (1969); *Washington Ethical Society* v. *Dist. of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1957); *Gibbons* v. *District of Columbia*, 116 U. S. 404 (1886).

In the oft-cited case of *Bell's Gap R.R.* v. *Pennsylvania*, 134 U. S. 232, 237 (1890), this Court said:

> "The provision in the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from taxation at all, such as churches, libraries and the property of charitable institutions."

This language was cited with approval in several cases thereafter, *e.g.*, *Magoun* v. *Ill. Trust and Savings Bank*, 170 U. S. 283, 295 (1898). Individual Justices of this Court have also noted the practice of such exemptions with approval. See, *e.g.*, Reed, J., dissenting in *McCollum* v. *Bd. of Education*, 333 U. S. 203 (1949); Brennan, J., concurring in *Schempp, supra*, 374 U. S. at 301-302.

It has been argued, however, that analogy to other charitable or non-profit organizations cannot, itself, justify total property tax exemptions for religious institutions because the exemption extends to church property which does not serve a public welfare purpose (see, *e.g.*, GIANNELLA, 81

HARV. L. REV. at 550 and PFEFFER, *supra*, at 187). But this argument fails to recognize the fact that there is no practicable way to distinguish between the religious and charitable activities of the Church for purposes of developing a tax policy that maintains the intended neutrality.

As a practical matter, the public welfare activities and the sectarian activities of religious institutions are so intertwined that they cannot be separated for the purpose of determining eligibility for tax exemptions. Often a particular church will use the same personnel, facilities and source of funds to carry out both its secular and religious activities. Taxing the house of worship would, therefore, thwart the secular public policy of encouraging private public welfare organizations.

There is an almost 200-year history of religious property tax exemption to demonstrate that the danger sought to be avoided, namely union or tendency toward union of Church and State, has not materialized. There is nothing in that history or in the record of this case to suggest anything to the contrary.

POINT III

This Court has upheld exemptions from general laws based on religious considerations.

It seems clear from the decisions of this Court that where the State enacts a valid law whose primary purpose is clearly secular, but which may have an indirect inhibiting effect by its operation on the exercise of one or more religions, the State may grant non-discriminatory exemptions from the provisions of that law, based on religious considerations, to that class of persons adversely affected, without the exemption amounting to an establishment of religion.

Certainly, there is no establishment of religion where an exemption from an otherwise valid general law is compelled by the Free Exercise Clause. Thus, the majority of this Court in *Sherbert* v. *Verner*, 374 U. S. 398 (1963), found that appellant had to be excepted from a provision of a South Carolina unemployment compensation law which forced her either to forfeit her benefits under the law or abandon a principle of her faith . The Court held that:

> "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." (374 U. S. at 404).

Despite its finding in *Sherbert* that appellant could not be deprived of her benefits under the statute, the Court explicitly stated (374 U.S. at 409):

> "In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-day Adventist reli-

gion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religions with secular institutions which it is the object of the Establishment Clause to forestall."

Moreover, in circumstances where the Free Exercise Clause did not control, this Court has held that the States or Congress may, as a matter of policy, recognize religious considerations in granting exemptions from a valid general law with a wholly secular purpose, without violating the Establishment Clause. The Sunday Closing Law cases are an example of such situation.

In one of those cases, *Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961), the Court found that a Pennsylvania statute requiring that certain businesses be closed on Sunday, was not invalid as to appellants, because:

> "* * * [T]he statute at bar does not make unlawful any religious practice of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive."

Although the Court, on the basis of that analysis, rejected the argument that exemption should be compelled for those who observe a day of rest other than Sunday, Chief Justice Warren said (366 U. S. at 608):

> "A number of states provide such an exemption, and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation but with its constitutional limitation. Thus, reason

and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity."

In another line of cases, certain draft exemptions have been held not to violate the Establishment Clause. *Dickinson* v. *United States,* 346 U. S. 389, 394-95 (1953), upholding draft exemptions for ministers; *United States* v. *Macintosh,* 253 U. S. 605 (1931), conscientious objectors; *cf.,* Judge Weinfeld for the Federal District Court in *United States* v. *Branigan,* 299 F. Supp. 225, 230-31 (S.D.N.Y., 1969), divinity students. In all these instances, the valid secular policy was the draft itself. The exemptions were found, for example, to be a permissible classification, based on "legislative grace," intended to prevent religious sects from being deprived of their clerics (*Dickinson,* 346 U. S. at 304-05; see, also, the discussion by Mr. Justice Harlan in his dissent in *Sherbert, supra,* 374 U. S. at 422-23; Goldberg, J., concurring in *Schempp, supra,* 374 U. S. at 307-308.

There can be little doubt that *ad valorem* property taxes serve a secular purpose. As discussed above, the payment of such taxes might result in an unequal burden that could have an effect on the ability of a person to practice his religion, as for example, where a church or synagogue had to close because non-payment of taxes deprived its congregation of a house of worship. Also, the history of the exemption statutes indicates that such a policy is a reasonable classification consistent with another secular public policy of furthering the charitable work of churches. In this context, tax exemptions fit the pattern of cases in which this Court has sustained exemptions from secular regulations

for certain categories of persons based on religious considerations.

It need not be decided at this time whether the exemption in the case at bar, is compelled by the Free Exercise Clause, as in *Sherbert*, or is merely a matter of "legislative grace" as in *Braunfeld* and *Dickinson*. The telling point is that where an exemption may permissibly be carved out of a valid secular law because of religious considerations, if that exemption is a reasonable one, it will not be found to constitute an establishment of religion.

CONCLUSION

The appeal to this Court from the judgment of the New York Court of Appeals should be affirmed.

October 17, 1969.

Respectfully submitted,

J. Lee Rankin,
Corporation Counsel,
Counsel for Appellee,
Municipal Building,
New York, New York 10007.

Stanley Buchsbaum,
Edith I. Spivack,
Robert C. Dinerstein,
of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

FREDERICK WALZ,
Appellant,

–against–

TAX COMMISSION OF THE CITY OF NEW YORK,
Appellee

Appeal from the Court of Appeals of the State of New York

[redacted]

BRIEF OF PARISH HALL SCHOOL, INC. AS AMICUS CURIAE

NOEL THOMPSON, ESQ.
919 - 18th Street, N.W.
Washington, D.C.
Attorney for Amicus

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 135

FREDERICK WALZ,
Appellant,

–against–

TAX COMMISSION OF THE CITY OF NEW YORK,
Appellee

Appeal from the Court of Appeals of the State of New York

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Parish Hall School, Inc., hereby respectfully moves leave to file the accompanying brief *amicus curiae* in this case in support of appellee as provided in Rule 42 of the rules of this Court. Permission to file this brief has been requested of both parties.

Parish Hall School, Inc. is a nonprofit religious and educational organization organized under the laws of the District of Columbia. At present the students of Parish Hall School (Episcopal) attend school with the students in "Campus School" (Roman Catholic) on the campus of

Catholic University. Both schools have secular classes in common, but divide up to receive special religious instruction in their own faiths.

Parish Hall School is interested in the Separation of Church and State and does not look to any government for any assistance for its educational activities. On the other hand, it would be hampered in its religious efforts if it were to be taxed on any real property which in the future it may find necessary to carry on its educational mission.

The function of this *amicus curiae* is to present additional legal authorities for consideration by this Court in this important litigation.

The attached brief is submitted in the hope that it will assist the court in its deliberations. For the foregoing reasons, the *amicus curiae* respectfully requests that this motion be granted.

Respectfully submitted,

NOEL H. THOMPSON
919 - 18th Street, N.W.
Washington, D.C.
Attorney for the Amicus

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 135

FREDERICK WALZ,
Appellant,

–against–

TAX COMMISSION OF THE CITY OF NEW YORK,
Appellee

Appeal from the Court of Appeals of the State of New York

BRIEF OF PARISH HALL SCHOOL, INC.

INTEREST OF AMICUS

Parish Hall School, Inc. is a nonprofit religious church-sponsored educational corporation organized under the laws of the District of Columbia. As such it is entitled to the protections of the religious clauses of the First Amendment. It also accepts that the "establishment clause" of the First Amendment prohibits any government in the United States from aiding the school financially, since the primary purpose of the school is to educate in a Christian frame of reference. The school accepts the guidelines set forth in *Everson v. Board of Education* (330 U.S. 1, 15) as to the relationship

of a church-related school and the Federal and State Governments—in our case the District of Columbia.

Parish Hall School will need real property both for classrooms and for a chapel. Such real property will be used exclusively for educational purposes and the school shall propose to teach all subjects so as to relate the students to God. The school therefore believes that such a school is an instrument of religion and should be free of taxation on its real property used exclusively for religious purposes.

Whatever nonreligious property or income may be enjoyed is understood not to be relevant to the issues raised in this case.

STATUTE INVOLVED

Article XVI, Sec. 1, of the New York State Constitution and Sec. 420, Subdiv. 1, of the Real Property Tax Law of New York State authorize tax exemptions for real property owned by religious organizations and used exclusively for religious purposes.

THE QUESTION PRESENTED

Whether Article XVI, Sec. 1, of the New York State Constitution and Sec. 420, Subdiv. 1, of the New York Real Property Tax Law permitting tax exemptions for the real property owned by religious organizations and used exclusively for religious purposes violates the "free exercise" clause of the First-and the Fourteenth Amendment to the Constitution of the United States of America.

STATEMENT OF THE CASE

Frederick Walz is a citizen of the United States, a Christian, and not a member of any religious organization. He is a resident property owner in fee simple of real property located in the County of Richmond in New York City. He complains that Article XVI, § 1 of the New York State

Constitution and Sec. 420, Subd. 1, of the New York Real Property Tax Law unconstitutionally grant tax exemption to religious corporations on real property owned by them and used exclusively for religious purposes. He claims that such exemption "constitutes an involuntary payment by plaintiff to the aforementioned religious organizations, in violation of plaintiff's right of religious freedom" and without due process of law, in violation of the provisions of the Constitution of the United States of America.

The Tax Commission of the City of New York regularly grants exemptions from real property taxation to religious organizations on real property used exclusively for religious purposes.

SUMMARY OF ARGUMENT

There has recently been completed and published, authored by C. Stanley Lowell and Martin A. Larson, a 300-page study "The Churches: Their Riches, Revenues and Immunities." It shows that in 14 typical American cities and extrapolations therefrom, the assessed value of church property, the great proportion of which is not used for exclusively religious purposes, now reaches the astronomical figure of $102 billion. Voluntary contributions, passive income, active business income, government subsidies, and also such church-owned assets as stocks, bonds, investments in real estate, and commercial business property—as tax-exempt resources of churches—amount to some $164 billion.

Property used exclusively for religious purposes is but a fraction of this tax-exempt burden on the working citizens. Such property, unavoidably, is needed in relatively modest amounts to carry on the *identifying* function of churches—their relationship of people with God. This type of resource of churches was not considered when the principle of church and state was being engrafted into our constitutional system by the drafters of the religious clauses of the First

Amendment. Tax exemption for churches was not discussed, for, in fact, the problem was how to eliminate tax support for the churches.

Until the Federal Constitution was amended in 1791 the "State" had the power to levy taxes for any public purpose, both to raise revenue and to regulate activities. If the "State" desired to tax the property of churches designed and used exclusively for religious purposes it could have done so. At that stage in our nation's history, it was more likely that the governments were using taxes to support religion than to tax churches for revenue or control. After the First Amendment was adopted in 1791 and extended over the States by the Fourteenth Amendment adopted in 1868, it was no longer a legitimate end of government to either help or hinder churches in their religious functions. A new principle of government, called by Thomas Jefferson the separation of church and state, became the law of the land—a fundamental part of our political structure under our Constitution.

To summarize the argument presented in this brief, we believe that if the drafters of the religious clauses of the First Amendment were sitting as this Court, with all the information now available on the relationship of church and state in this country, they would have accepted two basic principles concerning church taxation as being compatible with the plan envisioned by their amendments to the Constitution:

(1) Real property owned by religious organizations used exclusively for religious purposes and other property designed and used exclusively for religious purposes are exempt as a matter of right from taxation by virtue of the "free exercise" clause of the First Amendment as extended to the States by the Fourteenth Amendment of the United States Constitution.

(2) Real property owned by religious organizations and not used exclusively for religious purposes and other property not designed and not used exclusively for religious

purposes are not exempt and cannot be exempted from such taxation as is imposed on similar property under similar circumstances owned and used by secular organizations by virtue of the Establishment Clause of the First Amendment as extended to the States by the Fourteenth Amendment of the United States Constitution.

Thomas Jefferson and James Madison today would be truly proud of the religious peace which pervades this great land based on their work and the efforts of many others which resulted in the fundamental principle of separation of church and state. The riotous conduct of sectarians in Ireland today gives raucous witness that the evils they helped us avoid are relevant to contemporary society and that we deal with no academic abstraction. This Court has an opportunity and a duty to clarify and preserve the constitutional basis of our religious freedom.

ARGUMENT

(1) REAL PROPERTY OWNED BY RELIGIOUS ORGANIZATIONS USED EXCLUSIVELY FOR RELIGIOUS PURPOSES AND OTHER PROPERTY DESIGNED AND USED EXCLUSIVELY FOR RELIGIOUS PURPOSES ARE EXEMPT AS A MATTER OF RIGHT FROM TAXATION BY VIRTUE OF THE "FREE EXERCISE" CLAUSE OF THE FIRST AMENDMENT AS EXTENDED TO THE STATES BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

(2) REAL PROPERTY OWNED BY RELIGIOUS ORGANIZATIONS AND NOT USED EXCLUSIVELY FOR RELIGIOUS PURPOSES AND OTHER PROPERTY NOT DESIGNED AND NOT USED EXCLUSIVELY FOR RELIGIOUS PURPOSES ARE NOT EXEMPT AND CANNOT BE EXEMPTED FROM SUCH TAXATION AS IS IMPOSED ON SIMILAR PROPERTY UNDER SIMILAR CIRCUMSTANCES OWNED AND USED BY SECULAR ORGANIZATIONS BY VIRTUE OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT AS EXTENDED TO THE STATES BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

On September 25, 1789, Congress proposed twelve articles of amendment to the Constitution of the United States. Except for the first two, they were ratified by the required number of States by December 15, 1791. These first ten amendments have since been known as the Bill of Rights. The original congressional resolution stated: "The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: . . .

". . . –Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The restrictive clauses–"Congress shall make no law respecting an establishment of religion, or prohibiting the

free exercise thereof. . ." are the accepted limitations on Government power with which we are here concerned.

Limitations on the power of the State to legislate on certain subjects characterize a limitarian form of government. No such restraints hobble a totalitarian state.

One of the results of the Civil War was that these clauses, which were originally only a restraint upon Congress, were extended to limit the power of the state legislatures. *School District of Abington Township v. Schempp*, 374 U.S. 203, and cases cited therein; *Murdock v. Pennsylvania*, 319 U.S. 105, 108; *Everson v. Board of Education*, 330 U.S. 1; *Illinois ex rel. McCollum v. Board of Education*, 33 U.S. 203, 210-211, *Zorach v. Clauson*, 343 U.S. 306; *McGowan v. Maryland*, 366 U.S. 420; *Torcaso v. Watkins*, 367 U.S. 488; and *Engel v. Vitale*, 370 U.S. 421.

These two restrictive clauses create one of the most important of civil rights—namely the "free exercise of religion" which may not now be invaded by either the State governments or by the Federal Government to which the First Amendment originally addressed itself. Justice Black in *Gideon v. Wainwright*, 372 U.S. 335 (1963) stated: "Explicitly recognized to be of this 'fundamental nature' and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, *religion*, assembly, association. and petition for redress of grievances." (p. 341) In *McGowan v. State of Maryland*, 366 U.S. 420 (1961) Justice Frankfurter reminded in his separate opinion:

"The general principles of church-state separation were found to be included in the Amendment's Due Process Clause in view of the meaning which the presuppositions of our society infuse into the concept of 'liberty' protected by the clause. *This is the source of the limitations imposed upon the States.*" (p. 460) (emphasis supplied)

It must be kept in mind that something new was added to political science by the religious liberty clauses of the First Amendment—namely, a principle which in the short-

hand of popular parlance is called the separation of Church and State. For most of the history of mankind the Church and the State have been linked together, not separate institutions. The distinguishing function of any State is that it regulates the relationships between persons and persons, and persons and things in the area over which its power extends and over the subject matter where it has jurisdiction. Where in a country the existence of "God" is accepted—and this has been almost everywhere save in today's Communist empires—there is recognized a relationship of person to person and person to things and to "God." To some this is the most important relationship of all.

Since a State seldom if ever taxed itself or its parts, it followed that early Governments did not tax religious properties. While in North America, the Church and the State were, in many ways, still partners, tax exemption of property used for religious purposes was taken for granted. (Cf. *All Saints Parish v. Inhabitants of the Town of Brookline* (178 Mass 404, 59 N.E. 1003 (1901)). In fact, tax support for religious functions was the rule rather than the exception. (Cf. Maryland, 1692, "An act for the Service of Almighty God and the establishment of the Protestant Religion within this Province.") In Pfeffer on *Church, State and Freedom*, at page 184, it is stated:

"The universality of the exemption of church property from taxes in the United States is hardly open to doubt; constitutional or statutory provision for such exemption exists today in all states as well as in the District of Columbia. Churches, other houses of worship, and the land on which they stand are everywhere freed from tax levies, as is personal property devoted to religious uses." (Cf. also, *General Finance Corporation v. Archetto*, 93 R.I. 392, 176 A.2d 73 (1961) at p. 77).

Although one would expect that the constitutional basis for continuing the tax exemption of property used exclusively for religious purposes would have been thrashed out by our contentious ancestors at the time they separated

Church and State at the federal level, a recent book, "*Should Churches Be Taxed?*" by D. B. Robertson, points out the poverty of source material on this important subject:

"There is nothing in the Federal Constitution of 1787 which grants tax exemption. There is nothing in the U.S. Constitution today which forbids the taxing of the property or income of religious groups, though there are those who think that exemption is implicit in the "free exercise" clause of the First Amendment. It is significant that one finds no single reference to the question of tax status of church property in discussions of religion and the adoption of the religious clauses of the First Amendment. Even Madison, who entered a protesting note on what he had heard about proposals in Kentucky to exempt church property, does not seem to have raised the issue in his efforts in favor of the adoption of the religious clauses of the First Amendment. . . . One wonders, however, why the records show no single protest on the point of tax exemption for churches in the debates on the First Amendment. One must assume, as many commentators suggest, that even though our founding fathers were not necessarily overly pious men, they saw the social benefits of a "free religion" and they assumed (in the absence of obvious signs to the contrary) that the American people approved the continued tax-exempt status of the various religious groups on a nonpreferential basis. They were, in other words pro-religious, if anticlerical or anti-eccelesiastical." (pp. 69-70)

In his book *The Folklore of Philanthropy* (1959), John Barzum throws in a little folklore of his own: "It was the Founding Fathers–the men of letters who wrote the Declaration of Independence and the Federalist Papers–who laid it down as axiomatic that schools, churches, and other institutions for welfare should be tax-free. They fastened the custom upon us like an immemorial law." (p. 178)

The fact of tax exemption for the religious activities of churches has universally been taken for granted. President

Ulysses S. Grant in recommending in his "State of the Union" message of December 7, 1875 that the Federal Constitution be amended to make church real properties subject to taxation obviously took for granted that the Constitution somehow prohibited such taxation. He recommended that all church properties be taxed except "only the last resting place of the dead, and possibly, with proper restrictions, church edifices." Similarly *Corpus Juris Secundum* reveals no questioning of the practice of state courts exempting the real estate of religious institutions from taxation especially where the exemption is spelled out in state constitutions and statutes. (84 C.J.S. 289-291). Arvo Van Alstyne in *Tax Exemption of Church Property*, 20 Ohio St., L.J. 461 (1959) points out: "Despite differences of emphasis, shortcomings of statutory language and unnecessarily voluminous litigation, it is evident that the policy of exempting church property from taxation is firmly rooted in American law."

Claude W. Stimson in his article *Exemption of Property from Taxation in the United States*, 18 Minn. Law Review 411 (1933-34), suggests that the "tradition" of tax exemption for churches comes from the fact that historically churches were public institutions not only exempt from taxes but actually supported by taxes. "A perusal of the history of tax exemption indicates that the granting of tax immunity to ecclesiastical and military property is probably as old as the institution of taxation. Church property, for example, was exempted under the doctrine that it ceased to be under human control when it was devoted to God. English history of the eleventh and twelfth centuries contains examples of ecclesiastical and military exemption as an accepted part of the tax systems. . . . The exemption of church and military property was handed down as a tradition, one of the many that the American colonists transplanted from Europe. The established colonial churches, in most cases, were public institutions supported from the government treasury." (p. 416)

This Court also has uniformly taken for granted the constitutionality of statutes granting tax exemption to "church buildings and ground actually occupied by such buildings." In *Gibbons v. District of Columbia,* 116 U.S. 404, 406 (1886), this Court held taxable real property owned by a church in the City of Washington and *not* used exclusively for religious purposes. The Court pointed out: "Upon the construction most favorable to the appellant, these statutes exempt nothing from taxation beyond church buildings and grounds actually occupied for such buildings, and the lands or grounds appurtenant to any such building, so far as reasonably needed and actually used for its convenient enjoyment for its legitimate purpose. Even parts of the exempted buildings and lands, if used to secure a rent or income, or for any business purpose, are taxable. But land which is neither actually occupied for a church building, nor reasonably needed and actually used for the convenient enjoyment of the building as a church, is not exempt from taxation, whether it is used for any other purpose or not." (p. 406-407) This opinion is precedent for holding constitutional a statute exempting from taxation real property used by churches for exclusively religious purposes. But it did not go into why that was so.

It is widely recognized that the provision respecting religious liberty in the Virginia Declaration of Rights of 1776 and the First Amendment to the Constitution have influenced similar provisions in almost every nation.[1] George Nebolsine in his examination of constitutional provisions and practices of European nations noted that they have followed the practice of our Country in exempting property used for religious worship from taxation.[2] While our Country may go beyond the scope of other nations in pro-

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[1]E.g., see Dr. C.A. Dunshee de Abranches, Protecano International Dos Dirietos Humanos (Brazil, 1964), pp. 39-40.

[2]George Nebolsine, Fiscal Aspects of Foundations and Charitable Donations in European Countries (European Cultural Foundation, 1963), p. 21.

tecting religious liberty, what others do and understand to be proper is clearly worthy of consideration by this Court in interpreting our Constituion.

Religion is deep in the hearts of the great majority of Americans—"religion" that is—not necessarily churches. Real property such as church sanctuaries and personal property designed for exclusively religious purposes and so used in the solemn and joyful task of relating persons to God command great public respect even among those whose experience does not permit them to accept a personalized God. Few will long tolerate the States' secular presence to burden or harass the free exercise of religion by taxing their rituals and sanctuaries, their prayers and blessings. Our people through their several constitutions have chosen to leave the relationships of people to God in the hands of the individual in his home or with groups of like-minded in their churches and synagogues. Our people through their Bill of Rights have accepted religious freedom as a civil right protected against any of their numerous Governments. To the extent that the worship function requires rituals, religiously designed personal and real property, architecture, poetry and music for its accomplishment, it is a custom of our people from time immemorial that tax exemption be permitted—this custom became "law" in the "free exercise" clause of the First Amendment.

This Court can remember the popular misconceptions which angered many good people arising from misinterpretation of the school prayer case. (*Engel v. Vitale*, 370 U.S. 421 (1962)). The Court was foolishly accused of driving "God" out of the schools; of forbidding voluntary prayers. In fact, it was only the practice of government officials in composing prayers and directing that they be recited like some sort of state program of religious calisthenics which this Court held contrary to our system of separation of church and state. Yet the atheists rushed in to prevent children from bowing their heads in silent meditation or singing Christmas carols and the godfearing rushed in to amend the Constitution to restore what had not been removed.

We contend that this Court may properly read the "free exercise clause" so as to stay the hand of the tax collector from burdening real property *used* for exclusively religious purposes (*Murdoch v. Pennsylvania,* 319 U.S. 105 (1943)). But, it is of equal importance that this Court clearly limit this exemption to strictly bona fide religious functions, otherwise a religious gold rush will be on to cover almost everything under the term "religious" from bingo games and church business enterprises to hospitals and poorhouses.

Of course real property is not *designed,* as personal property usually is, and so its *use* is determinative of whether it is protected from taxation not its *design.* It matters not in this context what other types of property—money, pencils, stocks, bonds—are used for, it is what they are designed and used for. It is too easily claimed that all property can be used to support religious activities. Property other than real estate to be protected from the State must be both *used exclusively for religious purposes* and *be designed* and made *exclusively for religious purposes.* For example, stained glass windows, church organs, chalices and candlesticks, altars, hymnals and Bibles are designed and used for exclusively religious purposes. These, for the preservation of religious liberty, should be exempt from taxation. Automobiles, private homes, stocks and bonds, and business, while often "used" to support religious activities, are not designed for such use and are not ordinarily exclusively so used. These properties must be taxed when owned by churches just as they are when owned by secular organizations.

On the other hand, if this Court should read the First Amendment to permit governments to either tax real property used exclusively for religious purposes or to exempt such property, at their discretion, then the religiously unconcerned, those hostile to the notion of God, those who give the Church and religion no priority as a public purpose or concern, may rush in to tax and destroy the sanctuaries, stone by stone, tax by tax.

It cannot be overemphasized that this is not the usual "tax" case, but a unique challenge to religious liberty. This Court has stated that the "great liberties insured by the First Article" occupy "a preferred position in our basic scheme." *Prince v. Massachusetts,* 321 U.S. 158, 164 (1944). The "establishment clause" put a stop to the then prevailing practice of supporting religion with tax dollars. Justice Black in *Everson,* 330 U.S. 1 (1947) summed it up: "No tax in any amount large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between church and state'." (p. 16) But can the "establishment clause" be turned into an invitation for the federal and state governments to impose taxes at will on churches—on their religious activities and properties used to pursue these activities? Since the church and state are now safely on their respective sides of the wall of separation, Justice Black might have added: "Nor may any tax be imposed on exclusively religious activities or church properties designed and used exclusively to teach or practice religion."

It is because the wall of separation has two sides that the status of "religion" differs from that of the free press and other rights protected by the First Amendment. That religious liberty is a two-sided wall protecting the State from the church and the church from the State was long ago recognized in a South Carolina case, *Harmon v. Dreher* (1 Speer's Equity 87) cited with approval in *Watson v. Jones,* (13 Wall. 679, 730 (1871)), and in *Everson* (supra at p. 15): "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured reli-

gious liberty from the invasion of civil authority." The State must be free of involvement in the affairs of the church and the church must be free of harassments or help from the State. Free in what way? Each must be free to carry on its distinguishing functions without the interference of the other. The constitutional plan accepts a "neutrality" between church and church and between church and State in our society:

> "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard . . ." (*School District of Abington T.P. Pa. v. Schempp*, 374 U.S. 203, 226 (1963))

When those who prepared the First Amendment and those who adopted it turned their attention to its wording, they had at hand Samuel Johnson's *A Dictionary of the English Language* in two volumes, published in 1755, which is incidentally equally available to this Court in the original in the rare book room of the Library of Congress.

The definitions are clear:

> "*Religion* 1. Virtue, as founded upon reverence of God and expectation of future rewards and punishments. (If we consider it as directed against God, it is a breach of *religion*; if as to men, it is an offence against *morality*.) (South)
>
> 2. A system of divine faith and worship as opposite to others." x x x
>
> "*Divine* 1. Partaking of the nature of God"
>
> "*God* 1. The Supreme Being - God is a spirit, and they that worship him must worship him in spirit and truth. (John IV: 24)"

Jefferson reiterated the then contemporary meaning of the term "religion" in his letter to the Danbury Baptist

Association (8 Jeff. Works 113, cited in *Reynolds v. United States*, 98 U.S. 145, 164 (1878), where he wrote: ". . . religion is a matter which lies solely between man and his God. . ." This Court also recognized the definition found in Johnson's Dictionary and has limited the meaning of "religion" as Johnson did: "The term 'religion' has reference to one's views of his relation to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. . ." (*Davis v. Beason*, 133 U.S. 333, 342 (1889)). John Locke stated in 1689, "I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other. . ." Locke, *A Letter Concerning Toleration*, in 35 Great Books of Western World (1952 - cited in *Schempp*, supra p. 231.)

The free exercise of religion, as defined above, is a matter of right—a constitutional right, now often described as a "civil right." "A constitutional 'right' means a legal relationship, the enjoyment of which may not be withdrawn save by a change in fundamental constitutional law." (25 C.F.R. 2.1 (f)). These civil rights which are guaranteed by the Bill of Rights are limitations on the authority of government. For example, no State may prohibit free speech, establish religion, or, here, tax the religious means used by churches to carry on their exclusively religious functions. Ordinarily, to enforce a "right" no action on the part of Government is required but merely a forbearance to act—here, not to tax real property owned by churches and used for exclusively religious purposes.

The interpretation of the "free exercise" clause for which we are contending will leave adequate room for local variations. The word "exclusively" can be interpreted broadly or narrowly in each of the 50 states with their several communities. The term "exclusively" will serve to eliminate activities other than "religious" which can reasonably be described as belonging to any additional category. Such an activity as the operation of a business, obviously, will not be for exclusively religious purposes. While a business organized

to perform services or create products may also serve God, this merely means that it is involved in one of the activities which while not exclusively religious are pleasing in the eyes of the Lord. To those deeply dedicated to religion all activities should so serve God.

Arvo Van Alystyne pointed out in *Tax Exemption of Church Property* (supra): "In some states, statutory provisions expressly deny exemption to otherwise qualified church property if income or revenue is derived therefrom;" (p. 478). In general, church property which produces income–even if the income is used exclusively for religious purposes–cannot be described as property used exclusively for religious purposes. (Cf. *In re Bond-Hill-Roselawn Hebrew School*, 151 Ohio St. 70, 72-73, 84 N.E. 2d 270, 272 (1940)) for "liberal" interpretation of "exclusive" in this context.

The limited interpretation of the word "religion" as used in the First Amendment wisely avoids bringing under the umbrella of the religious clauses activities which are not exclusively religious and would not have been considered pertinent in this constitutional context by the authors or adopters of these clauses. The "free exercise" protection was not directed at activities other than "religion"–*i.e.*, the relating of persons or things to "God", or as Mr. Justice Douglas explains in *United States v. Ballard* (322 U.S. 72 at p. 87 (1944)): "*Man's relation to his God* was made no concern of the state." (emphasis supplied)

It is unavoidable that any tax exemption made available to protect the exclusively religious functions of churches, as demanded by the "free exercise" clause of the First Amendment, runs a risk of abuse in that there inevitably will be those who will attempt to extend the protection to activities other than religious. The simple fundamental function of religion is to relate persons of God. God is a term not limited to the formal faiths of the Christian, Moslem or Judaist world, but is as broad as described in F. C. Salisbury's "Speaking of Politics" (1956)–also available in the Supreme Court Library or Library of Congress:

> "A 'God' is any person, force or thing worshipped by a person or group of persons, the existence of which is beyond the scientifically verifiable, which has, or is described as having, an effective relationship with persons and things." (p. 264)

Mr. Justice Frankfurter in his separate opinion in *McGowan v. State of Maryland*, 366 U.S. 420, 459 (1961), brings our attention to three opinions of this Court which held unconstitutional tax levies on exclusively religious or, as he writes, "sacramental" activities: "In each of these cases, it was believed that the State's need for revenue, which could be satisfied by taxing a variety of sources, did not justify a levy imposed upon an activity which in the light of history could reasonably be viewed as "sacramental." (pp. 462-463) The cases referred to were: *Follett v. Town of McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938; *Murdock v. State of Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292; and *Jones v. Opelika*, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290. In *Follett v. Town of McCormick* (supra) Justice Douglas summed up: "The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious (*Grosjean v. American Press Co.*, supra;) as the imposition of a censorship or a previous restraint. *Near v. Minnesota*, 285 U.S. 697. For, to repeat, "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment." (p. 577)[3]

Mr. Justice Murphy in his concurring opinion in *Follett* (supra, p. 578) pointed out the answer to criticisms which will certainly be argued in this litigation:

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[3]In *Zorach v. Clauson*, (343 U.S. 306) Mr. Justice Douglas wrote that it is the common sense of the matter that the church and the State are not to be aliens to each other and that it would be carrying separation of church and state too far if "churches could not be required to pay even property taxes." Perhaps he would be willing to rephrase that sentence to read: "Churches could not be required to pay even taxes on property not used exclusively for religious purposes."

"It is claimed that the effect of our decision is to subsidize religion. But this is merely a harsh way of saying that to prohibit the taxation of religious activities is to give substance to the constitutional right of religious freedom.

"It is suggested that we have opened the door to exemption of wealthy religious institutions, like Trinity Church in New York City, from the payment of taxes on property investments from which support is derived for religious activities. It is also charged that the decision contains startling implications with respect to freedom of speech and the press. I am neither disturbed nor impressed by these allegations. We are not called upon in this case to deal with the taxability of income arising out of extensive holdings of commercial property and business activities related thereto. There is an obvious difference between taxing commercial property and investments undertaken for profit, whatever use is made of the income, and laying a tax directly on an activity that is essentially religious in purpose and character or on an exercise of the privilege of free speech and free publication.

"It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds." (pp. 578-579)

Of the three cases cited by Mr. Justice Frankfurter, this Court here faced, discussed, and resolved the problem of taxability of religious activities most closely in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). The question was raised as to whether a municipal ordinance imposing a license "tax" on the distribution of religious literature with a solicitation of funds was constitutional. This Court pointed out: "Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. . .a state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. . ." (pp. 112-113). The majority

opinion was written by Mr. Justice Douglas and is of persuasive authority in this case.

The dissenting opinion of Mr. Justice Reed would provide a ready-made brief for those who will contend that the church in its purely religious activities—particularly property used exclusively for religious purposes—may be taxed—and consequently may be exempted from tax by operation of statute or State constitutional provision. (*Murdock v. Pennsylvania*, supra at 117-140). Mr. Justice Reed did not accept the majority position but contended: "Religious societies depend for their exemptions from taxation upon state constitutions or general statutes, not upon the Federal Constitution." (p. 128) He was impressed by the possibility of a similar claim of tax exemption by the press for he warned, relying on *Grosjean v. American Press Co.*, 297 U.S. 233, 250, that: "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government." But he forgot that "religion" in the Constitution is unique and not like the other freedoms in that not only is its exercise guaranteed against restrictions but the State may not benefit or aid this exercise.

On the other hand, the state may aid the press, give prizes for speeches, help the people to assemble, pay writers to draft their petitions—but it may not single out religion for any such aid. Look what happened when a state tried to help by writing a prayer! (*Engle v. Vitale*, 370 U.S. 421 (1962)). If the "free exercise clause" does not protect from taxation the real property of churches used exclusively for religious purposes, or the other property of churches *designed and used exclusively for religious purposes*, then the "establishment clause"—particularly as interpreted and explained by the Court in *Everson*—would require that such property be taxed the same as under any other ownership for any purpose for which a tax was assessed. If the "free exercise clause" does not protect from taxation such property of churches used exclusively for religious purposes, then appel-

lant's position is well taken. In such a case any tax exemption not protected by the "free exercise clause" and enjoyed by a church would be an indirect subsidy, a privilege, or aid to religion prohibited by the "establishment" clause of the First Amendment.

Mr. Justice Frankfurter in his dissent in *Murdock* (supra at 134) covers many of the points that can be raised in opposition to the constitutional principle suggested by the majority opinion in that litigation and contended for in this brief. He is correct that no one is contending that "a tax upon the income of a clergyman would violate the Bill of Rights. . . . no one would suggest that a clergyman who uses an automobile or the telephone in connection with business thereby gains a constitutional exemption from taxes levied upon the use of automobiles or upon telephone calls." (p. 135) The personal income or property of a clergyman or religious worker is ordinarily no different from similar income or property of persons employed in other activities. The great majority of the real property owned and used by persons involved in religious enterprises is seldom used exclusively for religious purposes. Ordinary business uses intrude on this "exclusivity." The bulk of the personal property so used was not designed and made for exclusively religious functions, but is property which can be used in secular activities and is so used.

On the other hand, it is obvious that a house of worship is used for worship—it has no other substantial or primary activity. Other uses are not protected by the "free exercise" clause from the hand of the tax collector. Actually, tax exemption of the income or property of clerics may be an unconstitutional aid to religion which could violate the "establishment clause." We agree that "a tax measure is not invalid under the Federal Constitution merely because it falls upon persons engaged in activities of a religious nature." (*Murdock*, supra p. 135). A tax measure to be invalid must fall on real property used exclusively for religious purposes or on personal property designed exclusively for religious use and so used.

Mr. Justice Frankfurter further in his dissent in *Murdock* pointed out: "As I read the Court's opinion, it does not hold that the taxes in the cases before us in fact do hinder or restrict the petitioners in exercising their constitutional rights. It holds that the power to tax the exercise of a privilege is the power to control or suppress its enjoyment." (p. 137) Justice Frankfurter stated further: "The power to tax, like all powers of government, legislative, executive and judicial alike, can be abused or perverted. The power to tax is the power to destroy only in the sense that those who have the power can misuse it." (supra, p. 137) The majority in *Murdock* put an end to this debate by recognizing that implicit in the "free exercise" clause is a limit on the State's power to impose a tax which restrains the free exercise of religion. Thus a myriad of contentions were voided by a simple recognition of the fact that the "free exercise" clause of the First Amendment withdraws the power to tax where it can be a restraint on the "free exercise" of religion. The power cannot be abused or perverted; it just doesn't exist!

The reasoning in *Murdock* brings us then to the general power of the State in our constitutional system to tax and to exempt from taxation. The power of the State to tax not merely as an instrument to raise revenue but also as a social control is explained in *Carmichael v. Southern Coal Co.*, 301 U.S. 495: "Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one . . . The legislature may withhold the burden of the tax in order to foster what it conceives to be a beneficent enterprise. . ." (p. 512) It would follow that if the State may tax real properties of churches used exclusively for religious purposes then either the federal or the state governments may leave such properties taxed or untaxed in order to promote or discourage certain churches, to restrict or suppress religion or to foster what is considered a beneficent exercise of religion. This would defeat the purpose of the great constitutional principle of separation of church and state.

In *Carmichael*, Mr. Justice Stone pointed out: "*Fear of constitutional restrictions*, and a wholesome respect for the proper policy of another sovereign, would explain [tax] exemptions of the United States, and of interstate railways. . ." (emphasis supplied, p. 513). All of the generalizations of law, set forth so clearly in *Carmichael*, were subject to the proviso that no constitutional restrictions were present requiring that the property be exempt from tax. The court could properly say in *Carmichael:* "It is inherent in the exercise of power to tax that a state be free to select the subjects of taxation and to grant exemptions. . . This court has repeatedly held that inequities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. . .

"Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis and when subjected to judicial scrutiny this must be presumed to rest on that basis if there is any conceivable state of facts which would support it. . .

"This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. *A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution.*" (pp. 509-510) (emphasis supplied).

Further, in *Loan Association v. Topeka*, 20 Wallace, 655, 22 L.Ed. 455 (1874), this Court reminds that:

"Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. . .

"The power to tax is therefore the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of *McCulloch v. The*

State of Maryland, 4 Wheat. 431, that the power to tax is the power to destroy." (p. 663)

Chief Justice Marshall in *McCulloch*, supra, also pointed out: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited*, but consistent with the letter and spirit of the Constitution, are constitutional." (emphasis supplied) What does that mean for this case? It means that under the broad power to tax granted to the Federal Government by the Constitution before its amendment—the taxation of church real property used exclusively for religious purposes would have been permitted—but since the purpose and effect of the subsequent "free exercise" clause of the First Amendment was to limit this broad power, the taxation of "religion" was thereafter prohibited.

While the United States might have been described as a "limitarian" form of government before the Constitution was amended, it certainly became such after the adoption of the First Amendment. To paraphrase Chief Justice Marshall—subsequent to the First Amendment, it was no longer a "legitimate end" to tax real property used exclusively for religious purposes whether for the purpose of raising revenue or as a "device for regulating conduct." Mr. Justice Douglas in his concurring opinion in *First Unitarian Church v. County of Los Angeles*, 357 U.S. 545 (1958) put it nicely: "There is no power in our Government to make one bend his religious scruples to the requirements of this tax law."

The intent, if not the letter of the constitution, as amended, no longer permits a tax which would place a burden on the protected right of free exercise of religion. One might ask, "Why not the letter of the First Amendment? Why, if the drafters of the First Amendment wished to protect churches from the possibility of tyranny by taxation, did they not so provide in express language?" The answer is clear: "No one had to fear any blows to religion

from Federal taxation, it being limited in scope and relatively unimportant, so much so that no mention of taxation was made in the entire Bill of Rights."

Chief Justice Marshall further made clear that when the Federal Government or the states have a constitutional right to tax—not prohibited by direct or indirect constitutional provision—the various legislatures have the final say as to the amount, type or extent of the particular taxation. There can be no doubt but that the degree of necessity of a federal or state act is for Congress or the state legislature, not for the courts. Marshall explained: "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretentions to such a power." (*McCulloch*, supra, p. 423) If the United States or the State of New York have authority to tax the real property of churches used exclusively for religious purposes, Congress and the state legislatures then have the final say as to what degree of taxation might satisfy their objectives. Either they have the right to tax such church property as they will, or they have no right to tax such property at all.

The First Amendment in stating that "Congress shall make no law. . . prohibiting the free exercise [of religion]" meant exactly what it said, and *tax laws are laws.* Any State government, save ours, with or without the consent of its people may be hostile to religion and churches. As the courts have pointed out, if the federal and state governments

have the right to tax or not to tax the property of churches used exclusively for religious purposes, these same governments will have the right to tax them out of existence. Outstanding examples are sanctuaries used *exclusively for religious purposes* including the Washington Cathedral of the Episcopal Church and the Washington Shrine of the Immaculate Conception of the Roman Catholic Church. If such church buildings are taxed by hostile administrations, will such governments prove as broadminded as the Soviet Union which at least would preserve them as museums? One important difference between the Soviet constitution which also enforces separation of church and state and the Constitution of the United States is that the Soviet constitution separates the church and the State in such a way that the church can be not only separated but eliminated. The United States Constitution separates the church and the State but protects the church from the State and leaves both free to carry on their functions independently—of one another, dependent as both are on the other to exist in the same society. It would be ironic if this Court were to reduce the religious clauses of the First Amendment to a weapon against religion which the similar religious clauses of the Soviet constitution actually are.

The term "church" as used in the phrase "separation of church and State" refers to groups of persons come together to relate to God. Often churches undertake many activities which are not only not exclusively religious but actually are the province of other secular organizations—labor relations, health, business, secular education, charities, and the like. Churches often claim, or are gratuitously given for their nonreligious activities and properties, the constitutional protection of the "free exercise clause" while being unwilling to admit that the same activities and property come under the prohibitions of the "establishment clause". (Cf. *Everson v. Board of Education*, 330 U.S. 1 (1947)). For example, the unrelated business activities of churches are familiar to the general public and to this Court. They have been

thoroughly spelled out in "The Churches: Their Riches, Revenues and Immunities," by Martin A. Larson and C. Stanley Lowell (1969). In addition, the constitutionality of the tax exemption afforded by federal statute to the unrelated business income of churches is being contested in the Federal District Court in New York City in *Americans United v. Stratford Retreat House.* (U.S.D.C. Southern Dist. of N.Y. Civil Action N. 289-69). There it is contended that tax exemptions, other than on the exclusively religious properties and functions of the church, violate both the "establishment" and "free exercise" clauses of the Federal Constitution. It is also subject to litigation in the federal District Court in Baltimore, Maryland, in *Seversmith v. Machiz.* (U.S.D.C. District of Maryland Civil Action N. 15756). The justified cry against the financial privileges of churches sheltered by various and numerous forms of tax exemption should not be directed against the universal tax exemption on property used for exclusively religious purposes, but against the exemptions and privileges enjoyed on other types of property owned by churches. The real social danger from the tax-exempt incomes and properties of churches arises from their income producing properties—their unrelated businesses—not from their property used exclusively for religious purposes. These other nonreligious properties are certainly taxable, for as Mr. Justice Douglas pointed out in his concurring opinion in *Engel v. Vitale*, 370 U.S. 421 (1962): "The point for decision is whether the Government can constitutionally finance a religious exercise. Our system at the federal and state levels is presently honeycombed with such financing. Nevertheless, I think

it is an unconstitutional undertaking whatever form it takes." (P. 437 and Note (1))

Religious persons gathered together in what is above defined as a "church" or as individuals have a constitutional right to make choices in how they worship "God." Others not gathered together as a "church" or individually may choose not to worship "God." This is the free exercise of religion. Some may choose to erect a great cathedral at their own expense. Others may worship in a store front church or at home. The choice of whether to worship by the erection of a cathedral would no longer be "free choice" if the property to be used were subject to the State's unlimited power to tax. In such a situation the initial costs plus taxes might well be prohibitive. Property taxes might require that an existing cathedral be demolished or abandoned. The same problem is not present where the legislative body, usually local, might find it necessary to *assess* all properties in a particular neighborhood for streets, sewage, sidewalks and such. *"Qui sentit commodum debit sentire onus"*—as our predecessors would have put it. This would not be a "tax". It was explained in *Carmichael v. Southern Coal & Coke Co.* (301 U.S. 495).

> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. See *Cincinnati Soap Co. v. United States*, supra. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good." (p. 523)

It is only taxes—not assessments and other charges for bona fide services which churches may avoid by reason of

their favored position under the First Amendment.[4] It is real property used exclusively for religious purposes and personal property designed for and exclusively used for religious purposes—not income producing property—which qualified for this basic protection.

Mr. Justice Reed in his dissenting opinion in *McCollum v. Board of Education*, 333 U.S. 203 (1948) accepted freedom from taxation as one of "those incidental advantages that religious bodies, with other groups similarly situated, obtain as a by product of organized society. This explains the well-known fact that all churches receive 'aid' from government in the form of freedom from taxation." (p. 238) Actually, in our American society no other groups are similarly situated to a religious body. The State is not prohibited from aiding any other group to carry out its purposes nor forbidden to hinder it at the same time. (Cf. *Everson* at p. 15). If the church is advantaged by the tax exemption on its property used exclusively for religious purposes under the "free exercise" clause, then it is disadvantaged by the prohibition of tax-supported aids under the "establishment" clause.

Mr. Justice Brennan in his concurring opinion in *Abington School District v. Schempp*, 374 U.S. 203 (1963) at p. 260 equates tax exemption with ordinary governmentally provided services such as police and fire protection. He stated: "For religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups. And as among religious beneficiaries, the tax exemption or deduction can be truly nondiscriminatory, available on equal terms to small as well as large religious bodies, to popular and unpopular sects, and to those organizations which reject as well as those which accept a belief in God." (p. 302) In law, tax exemption for churches is in a separate and different category as far as a religion activity is concerned, and derives from the favorable

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[4]cf. *City of Chicago v. Baptist Theological Union*, 115 Ill. 245, 2 N.E. 254 (1885).

constitutional position of religion and not as a gratuitous aid which the State may grant or withdraw according to its then assessment of the desirability of religion.

Let us note before concluding this argument that the interference with the free exercise of religion involved in the taxation of the property of churches used exclusively for religious purposes becomes clear if we think about its enforcement. If the great Cathedral of St. John the Divine in New York were to be taxed on a value basis, upon failure to pay the tax, might it not be necessary for the State of New York to put the cathedral up for sale? Might it not be necessary for its communicants to tear it down and replace it with a less costly structure? It is easy to see why it could categorically be said in *Constitutionality of Religious Tax Benefits*, 49 Columbia Law Review 967, (1949): "The exemption from taxation of property devoted to religious uses constitutes the oldest tax benefit conferred upon religious institutions. Constitutional or statutory provisions for such exemptions exist today in all states and the District of Columbia." (p. 969)

This confrontation will be avoided by recognizing the rule of law and constitutional interpretation which is argued for in this brief. It will also provide a logical basis for countless decisions which have taken for granted tax exemption for property of religious groups used exclusively for religious purposes. Such cases are compiled in 84 *Corpus Juris Secundum* 289-291. While most take the principle for granted and rely on state constitutional provisions or statutes, the adoption of the interpretation implied in *Murdock* (supra) and here argued in greater length, provides a basis in constitutional principle for opinions heretofore accepted without inquiry and will avoid in the future a plethora of unnecessary litigation.

At the state level four important cases have challenged tax exemptions based on religious grounds. The exemptions were upheld in all four cases. This Court declined to pass on three of the cases presented. The cases were: *Garrett*

Biblical Institution v. Elmhurst State Bank, 331 Ill. 308, 163 N.E. 1 (1928); *Lundberg v. County of Alameda, et al.*, 46 Cal. 2d 644, 298 P 2d 1 (1956) and *Heisey v. County of Alameda et al.*, app. dismissed 352 U.S. 921 (1956); *General Finance Corp. v. Archetto, Tax Assessor*, 93 R.I. 392, 176 A 2d 73 (1961), app. dismissed, 369 U.S. 423 (1962); *Madalyn E. Murray, Trustee, et al. v. Comptroller of the Treasury of Maryland, et al.*, 241 Md. 383, 216 A 2d 897 (1966), cert. den., 385 U.S. 816 (1966).

We do not believe that these opinions will be particularly helpful in this litigation even though all can be used to support the proposition that it is not unconstitutional to exempt from taxation the property of churches used exclusively for religious purposes. It is incredible that the Court of Appeals of Maryland–in the same year that it produced its great opinion in *Horace Mann League v. Board of Public Works*, 220 A 2d 51 (1966)–should have come up with the strange opinion in *Murray v. Comptroller of the State of Maryland*, 216 A 2d 897. The latter opinion might be described as finding that there is no property used exclusively for religious purposes in Maryland. There, it appears, the churches perform primarily secular welfare functions and any aid resulting from statutory tax exemption to religious denominations is merely incidental to the achievement of a secular purpose.

The Maryland court held that tax exemption for places of worship was perhaps religious in origin but that:

> ". . .today, religious organizations, as a major part of their functions, carry on activities secular in nature, of substantial benefit to the community, such as aid to the poor and aged, day nurseries, care of the sick and efforts to eliminate racial inequalities. Programs such as these serve public needs; the performance of these functions by private agencies saves the State the expense of providing the same services. If there could be a fair and practical division of the portions of church-owned properties devoted to the conduct of such secular activities, a

> proportionate tax exemption of the parts of the properties devoted to such uses could have been considered. But the practical administrative difficulties in such an apportionment are apparent, and courts cannot say that the expense and inconvenience involved would not be disproportionate to the revenue obtained. *Carmichael v. Southern Coal & Coke Co.*, supra, 301 U.S. at 511. If no exemptions were given the religious organizations for the partial use of their properties for secular purposes, when charitable and other institutions which carry on similar work are granted exemption, serious questions of unconstitutional discrimination might arise." (pp. 907-908)

The Maryland Court thus held that the churches in Maryland are primarily secular welfare agencies. The court goes even further and equates churches with other fringe benefits offered by real estate developers to increase the tax base of their lands to the mutual benefit of the developer and the tax collector. It annihilates the principle of church-state separation by defining the church out of existence on the authority of the city assessor. The Maryland Court said:

> ". . .there is, today, a generally recognized reason, entirely secular in nature, for the state to encourage the building and maintenance of houses of worship. Such edifices and the activities carried on therein, may well be deemed to attract persons to communities and to tend to increase the general tax assessment base. Real estate developers are donating sites to churches in their planned communities as part of the efforts to attract purchasers. Columbia, a city projected to arise in Howard County between Baltimore and Washington, plans to have churches as well as super-markets and office buildings as part of the community—obviously in hope of attracting purchasers for the lots and houses. Anderson, *A Brand New City for Maryland*, Harper's Magazine, November, 1964. The Baltimore Urban Renewal and Housing Agency, whose goal is the prevention and elimination of blight and slums, has invited churches,

> with other community groups and institutions, to share in the formulation of plans for project areas. The increase in the general tax base through the building of houses and apartment houses by persons attracted by the presence of a church in the neighborhood is a governmental motive in no way connected with the support or establishment of religion. The object sought can not reasonably be deemed to be attainable with equal effect without the tax exemption of houses of worship." (pp. 908-909)

It is a happy coincidence that the legal solution to this problem in church-state relations can claim the acquiescence of so many Christians and Judaists without infringing the constitutional rights of the appellant.

A Baptist minister is quoted in the August 19th edition of the *Albuquerque Journal* as pointing out in perhaps an oversimplified but certainly relevant manner: "If it is right that the state should not support the churches, then it is right that the churches should not support the state." Fredrick Walz's complaint lies elsewhere than against freedom from taxation of real property used exclusively for religious purposes; and his is a genuine complaint which can and will be answered in other litigation.

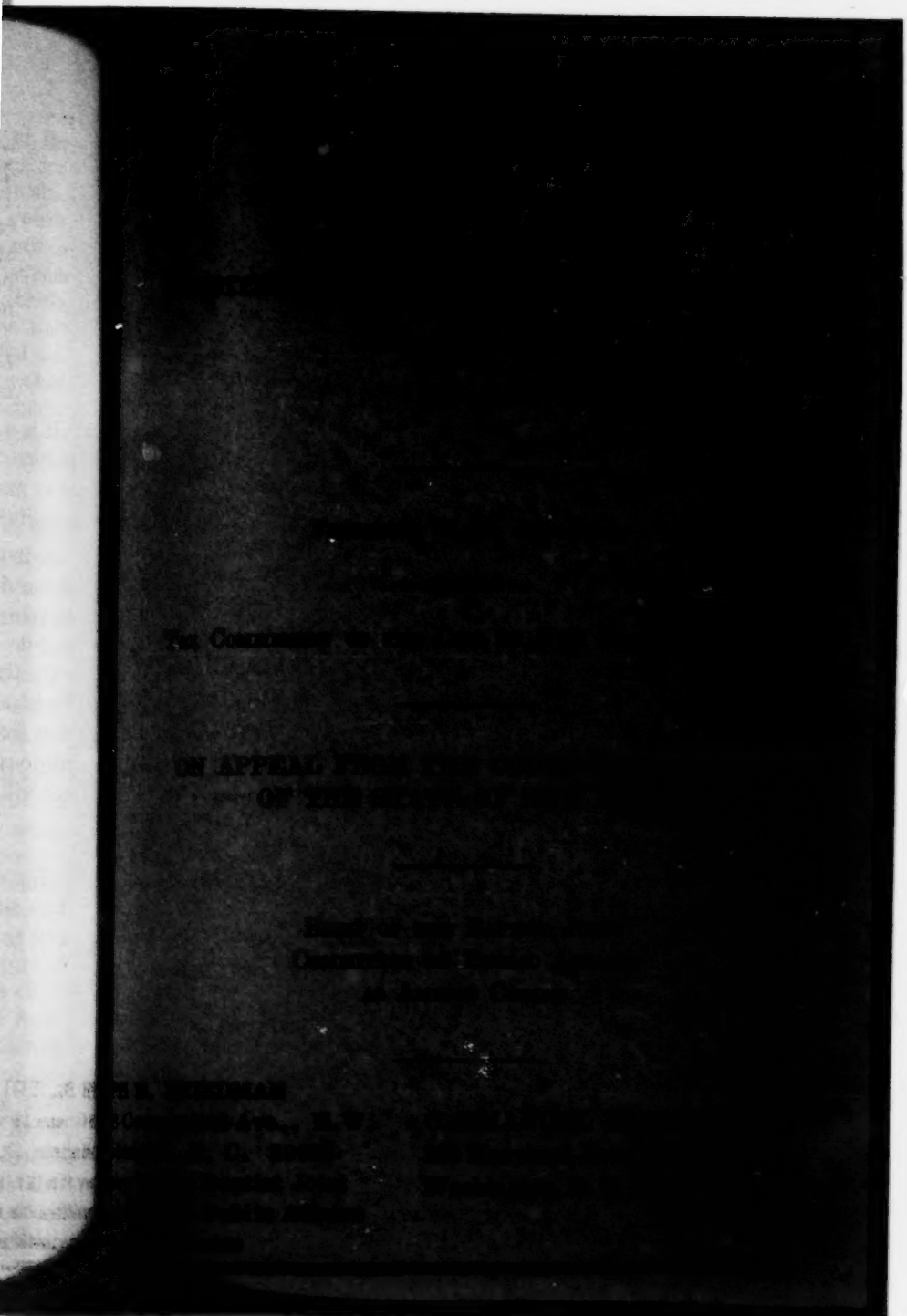
CONCLUSION

The order of the Court of Appeals of the State of New York should be affirmed.

Respectfully submitted,

THE PARISH HALL SCHOOL
Amicus Curiae

NOEL THOMPSON, Esq.
Attorney for
Parish Hall School



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 135

FREDERICK WALZ, *Appellant*

— against —

TAX COMMISSION OF THE CITY OF NEW YORK, *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF THE BAPTIST JOINT
COMMITTEE ON PUBLIC AFFAIRS
AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The Baptist Joint Committee on Public Affairs is made up of public affairs committees from the American Baptist Convention, The Baptist General Conference, the National Baptist Convention of America, the National Baptist Convention, U.S.A., Inc., the North American Baptist General Conference, the Seventh Day Baptist General Conference, and the Southern Baptist Convention. These Baptist groups have some 23 million members who evidence a di-

rect interest in church-state relations. The Joint Committee has as one of its mandates to act "whenever Baptist principles are involved, or jeopardized through governmental action. . . ." Among Baptists religious liberty is a fundamental religious principle. That principle is also an important constitutional principle of American government. In the opinion of the Baptist Joint Committee that principle is jeopardized by appellant's case.

STATUTES INVOLVED

Article 16, Sec. 1 of the New York State Constitution and Sec. 420 sub. 1 of the Real Property Tax Law of New York provide for real property tax exemption for property used exclusively for religious purposes.

QUESTION PRESENTED

In general the question is presented: Did the Court of Appeals of the State of New York err in holding that the real property tax exemption on property used for religious purposes is not in violation of the First and Fourteenth Amendments of the federal Constitution? More specifically the question may be stated: Does the federal Constitution *prohibit* states from exempting from taxation real property owned by religious organizations in the form of associations and corporations and used for religious purposes?

STATEMENT OF THE CASE

Frederick Walz, a citizen of the United States of America, states that he is a Christian though not a member of any religious organization. By that statement he sets up his definition of the nature of religious commitment and experience. It is a definition which takes cognizance of the

individual dimensions but excludes the group dimensions of religious experience.

He is an owner in fee simple of real property located in the County of Richmond of New York City, New York. His complaint is that exemption from taxation of real property of religious organizations in the form of associations or corporations and used by them for religious purposes forces him to pay higher taxes than he would for the same public services if those religious properties were taxed. This, he claims, "constitutes an involuntary payment by plaintiff to the aforementioned religious organizations, in violation of plaintiff's right of religious freedom" and confiscates his property "without due process of law, in violation of the provisions of the Constitution of the United States of America." Thus his understanding of religious freedom does not include provision for free churches or other religious groups. While most churches are incorporated, to view religious organizations merely as corporations is to distort the true meaning of those organizations.

The New York Tax Commission replied that tax exemption of real properties of religious organizations was provided for in law and that the appellant was neither aggrieved by this policy nor denied rights sufficient to state a cause of action.

ARGUMENT

(1) The exemption from taxation by state and local government of real property owned by religious organizations and used for religious purposes is not prohibited by the federal Constitution.

(2) Constitutionally guaranteed religious liberty presupposes the free conscience and the free church. This re-

quires, by right, the freedom from taxation of property used for religious purposes.

(3) The federal Constitution in the First Amendment forbids Congress from "an establishment" of religion. This denial of power was made applicable to the states by the Fourteenth Amendment. Therefore, neither federal nor state governmental agencies can operate churches, and if such governmental agencies attempt to turn churches into a source of revenue for state purposes those attempts constitute restraints on the free exercise of religion.

Constitutional scholars have held almost unanimously that the meaning of the establishment clause referred simply to an act which established a religion or a sect as the "official" state religion or denomination. James Madison, who authored the First Amendment, was quoted by this Court (*Engel* v. *Vitale* 370 U.S. 421), "It is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

"An establishment" had a specific meaning to Madison and those who demanded the adoption of the Bill of Rights in return for the ratification of the new Constiution. It had nothing to do with tax exemption of church property—a practice which existed before the First and Fourteenth Amendments and has existed continuously to the present.

A question raised in this case is whether the Constitu-

tion *permits* state and local governments to grant tax exemptions to religious organizations for real property used for religious purposes as a reasonable exercise of the police power of the state to promote the general welfare. We hold that such tax exemption is permitted by the Constitution and that this cannot be construed as "an establishment" in the historical meaning of the term.

Further we hold that the First Amendment guarantee of religious liberty *requires* that real property owned by religious organizations and used in the main for religious purposes be exempt from taxation.

In keeping with this we would emphasize that the word "religion" and, hence, "religious" is not capable of any one completely objective definition. To establish such tests as the sacerdotal content of the functions of an organization is to miss this point by adopting one definition. Religion is both subjective and experiential. The genius of religious liberty lies in its acceptance of pluralism. Thus an attempt at a particular definition could be considered an establishment *per se*.

We acknowledge a validity in the argument of *quid pro quo* between governmental agencies and church agencies which has been used so often by American courts to justify tax exemptions. Such an argument, however, is most applicable in the area of public services performed by the churches and should not be applied to the strictly religious functions of religious organizations. If the idea of a *quid pro quo* is used with reference to worship or religious education it tends toward a contractual relationship which invites terms and conditions which can readily be misunderstood and misused by church and state alike. Tax exemption of real property of religious organizations most appropriately rests on the principle of religious liberty.

We further assert that the burdens on the individual taxpayer brought about by the tax exemption of real property of religious organizations which is used for religious purposes is, in this case as in other specific situations, so unsubstantial that it is not sufficient cause for action. We have heard and read of "research" which claims to indicate a vast wealth on the part of religious organizations, but we have not found well validated factual reports. The real property used for religious purposes, however, is only a small and indeterminate part of that estimated wealth. Many churches have affirmed the propriety of paying for the public services rendered to their property. We hold that where the value of services rendered by government is ascertainable churches should pay for those services. We do not concede that they can be taxed directly or indirectly through forced payments for public purposes. Nonetheless, the question is not one of the ability to pay but rather it is the right of religious freedom which is attached to real property used for religious purposes.

We also assert that there is a grave and probable threat to freedoms in general when inroads are made on the First Amendment freedoms. We recognize that these freedoms are not absolutes but we consider religious liberty so fundamental that we view with alarm any action which might infringe upon it. Religious liberty requires the degree of separation of church and state afforded by the tax exemption of real property that is used for religious purposes.

Our understanding of the dignity of man requires a free exercise of religion that includes the free conscience and the free church. These are not incongruous nor incompatible but are, rather, vitally interdependent. It is possible to emphasize the individual's freedom from coerced religious participation to the point of an absolute that threatens the

freedom of religious assembly for those who have such convictions. We feel that appellant made this overemphasis. We stress that the institutions of religion are not the end in view, and we do not plead institutional hardships as valid reasons for tax exemptions by the state. However, we do hold that the fulfillment of man's religious potentials, both personal and corporate, should be excluded, and, according to the Constitution, must be excluded, from the taxing competence of the state.

CONCLUSION

The decision of the Court of Appeals of the State of New York should be affirmed.

Respectfully submitted,

C. EMANUEL CARLSON
Executive Director for Amicus Curiae

October 15, 1969

Joseph B. Friedman
1028 Connecticut Avenue, N.W.
Washington, D. C. 20036

Attorney for the Baptist Joint Committee on Public Affairs As Amicus Curiae

APPENDIX

BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

October 7, 1969

A STATEMENT OF POLICY ON THE TAXATION OF CHURCH PROPERTY*

In the United States it has been a tradition that church property is exempt from the payment of most state and federal taxes almost without reference to its nature. Seldom has real property of churches used for religious purposes been taxed. In addition, churches and their employees in doing the work of churches have been exempt from most sales, use, and excise taxes. Churches do not pay taxes on their income. Gifts and donations to churches are given a special tax status as nonprofit organizations. Investments by churches have a privileged position.

Entire denominations and individual churches generally have accepted these exemptions without examining either the legal or the ethical reasons behind them or without attempting to establish a rationale which distinguishes between legitimate and non-legitimate tax exemptions for the future as well as the present.

Realizing the necessity for clear rationale, the Baptist Joint Committee on Public Affairs on October 7, 1969 approved the following statement:

Any claim which churches may make for exemption from

*As used in this document the word "churches" comprehends all places of worship, i.e., synagogues, Buddhist temples, etc.

the payment of taxes or for special tax status must be based on either (1) the concept of religious liberty, or (2) the concepts of equality or equity.

Religious liberty:

1. Religious liberty is guaranteed by the First and Fourteenth Amendments of the Constitution. That freedom may be limited by government only when there is overwhelming evidence that a failure to limit would result in serious danger to the health, safety, morals, or general welfare of the people of a state or the entire nation.

2. Religious liberty is a vital part of the legal heritage of this nation. It is also an equally vital part of the personal, emotional, and intellectual life of the citizens of this nation.

3. The ability of government to tax certain church property, such as that used for religious purposes, could at least hinder or prosper particular religious movements or manifestations. Religious liberty requires that there be few hindrances on churches as they attempt to achieve the purposes for which they have been organized and that whatever limits are imposed must be in the spirit of the First and Fourteenth Amendments. Religious liberty does not demand, however, the tax exemption of all church property and activity.

4. Among historically practiced exemptions difficult to justify on the basis of religious liberty, though some may be justified on the basis of equality and equity, are the following:

a. engaging in business projects unrelated to religious concerns, with income tax and property tax exemptions, in competition with private enterprise

b. ownership of real property which produces income but which is not taxed for local governmental services

c. claiming of tax exemption for property which is used for personal residence

d. long-term holding of real property on a tax exempt basis for capital gains.

5. Where the value of services rendered by government to a property is ascertainable churches should make payment for those services.

*Equality and equity:**

1. Churches, in operating such publicly standardized services as schools, children's homes, hospitals, pension boards, etc., should be given equality in tax privileges with other nonprofit organizations rendering the same social services to the community.

2. The freedom of churches to be active in social ministries without being handicapped by tax burdens that are not applicable to comparable public or other private nonprofit agencies is an important principle of equality.

3. In the event that complete equality is unfair, churches should seek to achieve equitable treatment.

4. Exemption from taxation on the basis of services rendered requires a commitment to the common good rather than to a selective religious ministry or to a program of religious recruiting.

The dignity of man requires a free exercise of religion that includes the free conscience and the free church. These are not incongruous nor incompatible, but are, rather,

*Equality usually refers to sameness and equity denotes fairness or substantial justice.

vitally interdependent. The fulfillment of man's religious potentials, both personal and corporate, should be excluded from the taxing competence of the state.

Where religious compassion for fellowmen is genuine, it is not sectarian nor biased on such social categories as race, national origins, or group affiliations. Service to others should not be taxed simply because it is rendered by religious agencies.

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No. 135

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

FREDERICK WALZ,
Appellant,

–against–

TAX COMMISSION OF THE CITY OF NEW YORK,
Appellee

Appeal from the Court of Appeals of the State of New York

BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

Franklin C. Salisbury
1518 K Street, N. W.
Washington, D. C. 20005
Tel. No. (202) 783-3617
Attorney for Amicus

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 135

FREDERICK WALZ,
Appellant,

–against–

TAX COMMISSION OF THE CITY OF NEW YORK,
Appellee

Appeal from the Court of Appeals
of the State of New York

BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE[1]

INTEREST OF THE AMICUS CURIAE

"Americans United," incorporated as Protestants and Other Americans United for Separation of Church and State, is a nonprofit, educational corporation organized under the

[1] All parties have consented in writing to the filing of this brief.

laws of the District of Columbia and is a national organization of over 100,000 members interested in the preservation of religious civil rights guaranteed the people by the constitutional principle of separation of church and state. The sole purpose of the group is the defense of religious liberty under the religious liberty clauses of the state and Federal constitutions.[2] "Americans United" and many of its members have suits pending in various courts seeking redress for alleged infringements against their constitutional right as citizens and taxpayers to be free of "establishment of religion." Americans United fears clerical establishment may be restored through tax exemption of the church in its many facets. The "church" today is increasingly involved in business, welfare, and political activities sheltered by various forms of tax exemption that give it a power not enjoyed by other persons and groups. This growing power is at the expense of religion, derogatory of religious liberty and unfair to interests not similarly exempt from "taxation."

STATUTE INVOLVED

Article XVI, Sec. 1, of the New York State Constitution and Sec. 420, Subdiv. 1, of the Real Property Tax Law of New York State which authorize tax exemptions for real property owned by religious organizations and used exclusively for religious purposes.

THE QUESTION PRESENTED

Whether Article XVI, Sec. 1, of the New York State Constitution and Sec. 420, Subdiv. 1, of the New York Real Property Tax Law, permitting tax exemptions for the real property owned by religious organizations and used exclusively for religious purposes, violate the religious clauses of the First and Fourteenth Amendments to the Constitution of the United States of America.

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[2] For further description of "POAU" see Leo Pfeffer, *Church, State, and Freedom* (1967 Beacon Press), p. 234.

STATEMENT OF THE CASE

Frederick Walz is a resident owner of real property in the County of Richmond in the City of New York. He seeks a court determination that Article XVI, Sec. 1 of the New York State Constitution and Sec. 420, Subdiv. 1, of the New York Real Property Tax Law unconstitutionally grant tax exemption to religious corporations on real property owned by them and used exclusively for religious purposes. The grounds for such complaint are that such exemption "constitutes an involuntary payment by plaintiff to the aforementioned religious organizations, in violation of plaintiff's right of religious freedom" and confiscates his property.

SUMMARY OF ARGUMENT

A state's power to tax or to exempt from tax church property used exclusively for religious purposes is not one that is subject to the limitations of the religious clauses of the First Amendment to the Federal Constitution. The power to tax or to exempt from tax is one of those residual powers of sovereignty that remained with the states unless clearly denied them by the United States Constitution.

If a state in its discretion chooses to exempt houses of worship from tax, this is a legitimate use of its taxing authority and does not constitute an act respecting establishment of religion. The "no-establishment" clause of the First Amendment, made applicable to the states by the Fourteenth, does not impose on the states a mandate to tax houses of worship. Nor does the "free exercise" clause of the First Amendment, made applicable to the states by the Fourteenth Amendment, make mandatory the exemption of houses of worship from tax. Residing with state and local authorities is the taxing power—*i. e.*, the power to exempt from tax or to tax. This power may not be removed or curtailed by Federal authority without a clear constitutional mandate. The courts offer avenues of protection for taxpayers against unjust, capricious or confiscatory abuse of the power to tax.

ARGUMENT

THE POWER TO TAX OR TO EXEMPT FROM TAXATION THE REAL PROPERTY OF CHURCHES, USED EXCLUSIVELY FOR RELIGIOUS PURPOSES, IS DISCRETIONARY WITH THE STATES AND IS NOT INHIBITED BY THE FIRST OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Relying on the religious clauses of the First Amendment to the United States Constitution, adopted in 1791, the appellant seeks protection from an alleged coerced support of churches through a subsidy in the form of a tax exemption on their real property used exclusively for religious purposes. The claim is that the "establishment" clause, which prohibits any aid to religion from the United States or the individual states, prohibits aid in the form of tax exemption. Such exemption in New York State rests on the provisions contained in Article XVI, Sec. 1, of the New York Constitution and Sec. 420, Subdiv. 1, of the New York Real Property Tax Law.

Article XVI, Section 1, of the Constitution of the State of New York–in as far as is here pertinent–provides:

> "Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for *religious*, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit." (emphasis added)

Section 420, Subdiv. 1, of the New York Real Property Tax Law provides:

> "Real property owned by a corporation or association organized exclusively for . . . religious . . . purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section."

It must be clear that, save for any prohibition in the United States Constitution which by its terms covers, or by judicial interpretation has been extended to cover, the individual state, New York State has the clear power to tax or exempt from taxation the real property of churches used exclusively for religious purposes. It is claimed, however, that the "establishment" clause of the First Amendment, which has long since been interpreted to apply its strictures to both the Federal Government and the state governments, (*Cantwell v. Connecticut*, 310 U.S. 296, 303) forbids any aid on the part of the United States or any state to any church.

It is settled constitutional principle that the state is free to select its objects of taxation, and pursuant to this power, may altogether decline to tax certain kinds of property, so long as there is a reasonable basis for the exemption. *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1936); *Williams v. Baltimore*, 289 U.S. 36 (1933). Exemptions which the legislature, in its wisdom, grants to individuals or organizations, in order to encourage or foster the public good, long have been recognized as proper, and all that is required to sustain them is a showing of some fairly discernible relationship between the good of the person receiving the exemption and the good of the community. (*Williams v. Baltimore*, (p. 41)).

The State of New York has chosen in its fundamental law to exempt the real property of churches used exclusively for religious purposes. Is there anything in the "establishment" clause of the Federal Constitution which can be read to forbid this exemption? No. The highest court of the State of New York, in this very case, has upheld the validity of the statute granting tax exemption to real property owned by churches and used exclusively for religious purposes. The same result has been reached in numerous other state cases: See *La Fevre v. Mayor of Detroit*, 2 Mich. 586, 592 (1953); *Trinity Church v. City of Boston*, 118 Mass. 164, 165 (1875); *Trustees of Griswold College v. State*, 46 Iowa 275, 282 (1877); *Trustees of the First*

Methodist Episcopal Church, South v. The City of Atlanta, 76 Ga. 181, 192, 196-197 (1886); *Snyder v. Town of Newton, Conn.*, 161 A.2d 770, 776 (Conn., 1960), appeal dismissed, 365 U.S. 299 (1961); *General Finance Corp. v. Archetto*, 176 A.2d 73, 76-79 (R.I., 1961), appeal dismissed, 369 U.S. 423 (1961); *State ex rel Reynolds v. Nusbaum*, 115 N.W. 2d 761, 766 (Wisc., 1962). See also the following cases, which, without any particular discussion of the constitutional question, describe the salutary role such exemptions play in our society: *Nichols v. School Directors*, 93 Ill. 61, 64 (1879); *Y.M.C.A. of Omaha v. Douglas County*, 83 N.W. 924, 926 (Neb., 1900); *Commonwealth v. Y.M.C.A.*, 76 S.W. 522, 523 (Ky., 1903); *Church of the Holy Faith v State Tax Commission*, 48 P.2d 777, 784 (N.M., 1935).

There seems to be no question but that the highest courts of New York and of other states uniformly have upheld the constitutionality of tax exemption accorded to houses of worship, parsonages and other religious real property, whenever such an exemption has been attacked under state constitutional provisions requiring uniformity of taxation and forbidding the maintenance of churches by the state. No valid ground has been advanced by Appellant for a departure now from this settled authority.

The constitutionality under the Federal Constitution of exemptions accorded to churches has also been upheld by every state court or lower Federal court that has considered the question. The state cases are: *City and County of San Francisco v. McGovern*, 152 P. 980, 989 (Cal. App., 1915); *Garrett Biblical Institute v. Elmhurst State Bank*, 163 N.E. 1, 4-5 (Ill., 1928); *State v. Alabama Educational Foundation*, 163 So. 527, 530 (Ala., 1935); *Lundberg v. County of Alameda*, 298 P.2d 1 (Cal., 1956), dismissed, 352 U.S. 921 (1956); *Fellowship of Humanity v. County of Alameda*, 315 P.2d 394, 406-409 (Cal. App., 1957); *General Finance Corp. v. Archetto*, 176 A.2d 73, 76-79 (R.I., 1961), dismissed, 369 U.S. 423 (1961); *Sisters of Holy Cross v. Town of Brookline*, 198 N.E. 2d 624 (Mass., 1964).

The lower Federal court cases are: *County of Santa Clara v. Southern Pacific R.R. Co.*, 18 F. 385, 400 (9th Cir., per Associate Justice Field, 1882), affirmed, 118 U.S. 394 (1886); *Sovereign Camp W.O.W. v. Casados*, 21 F.Supp. 989 (D.C. N.M., 1938), affirmed, 305 U.S. 558 (1938); *United States v. Department of Revenue of State of Ill.*, 202 F.Supp. 757 (D.C. N.D., Ill., 1961), affirmed, 371 U.S. 21 (1962); *Swallow v. United States*, 325 F.2d 97 (10th Cir., 1963), cert. denied, 371 U.S. 950 (1963), rehearing denied, 372 U.S. 925 (1963).

The legal reasoning upon which the courts have unanimously found constitutional approval for religious tax exemptions is that such exemptions, because they do not involve the state in actively promoting or advocating religion or religious worship, are not within the category of governmental establishment of religion. Justice Reed in his dissenting opinion in *McCollum v. Board of Education*, 333 U.S. 203, (1948) lists tax exemption as one of the "incidental advantages that religious bodies, with other groups similarly situated, obtain as a by-product of organized society." He points out: "This explains the well-known fact that all churches receive 'aid' from government in the form of freedom from taxation." (p. 249)

Tax exemption is often regarded by the courts as one of the permissible "accommodations" to religion and it has always been recognized that the government may, in pursuit of its policy of neutrality, grant exemption to religious institutions in the same manner that it does to other charitable organizations.

There appears to be no Supreme Court opinion, directly on point, but a review of the cases where the subject of tax exemption for churches has been mentioned, and the cases which it has affirmed without opinion, leaves no room for doubt that the Supreme Court always has and still does consider religious tax exemptions to be constitutional.

An early Supreme Court case considering a tax exemption accorded religious institutions was *Gibbons v. District of Columbia*, 116 U.S. 404 (1886). There the question pre-

sented was whether grounds adjacent to St. Patrick's Church in the District of Columbia were exempt under a District of Columbia law exempting church buildings and grounds actually occupied by such buildings. The lower court denied the exemption on the grounds that the land neither was used for a church building nor reasonably needed for the enjoyment of the building as a church. The Supreme Court upheld the lower court's decision without questioning the soundness of the grant of tax exemption to the church on its exclusively religious properties. Likening the District of Columbia to a state, the court concludes its opinion by stating: "In the exercise of this power [the power to tax], Congress like any state legislature unrestricted by constitutional provisions, may, at its discretion, wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property." Since an exemption from taxation on real property used exclusively for religious purposes was involved, it is clear that this court had no reservations but that such an exemption was constitutional.

Further this Court has continually accepted as completely valid all nondiscriminatory exemptions from taxation granted to religious institutions under state and Federal tax statutes. That this Court may still hold to this view is shown by the fact that it recently dismissed, for want of a substantial Federal question, the only appeals to it from state court decisions upholding state religious tax exemptions, *Lundberg v. County of Alameda,* 298 P.2d 1 (Cal., 1956), dismissed, 352 U.S. 921 (1956); *General Finance Corp. v. Archetto,* 176 A.2d 73 (R.I. 1961), dismissed, 369 U.S. 123 (1961), and denied certiorari in the only case directly challenging the Federal income tax exemption to religious institutions, *Swallow v. United States,* 325 F.2d 97 (10th Cir., 1963), cert. denied, 371 U.S. 950 (1963), rehearing denied, 372 U.S. 925 (1963). Further evidence of this Court's present attitude may be found in *Abington School District v. Schempp,* 374 U.S. 203 (1963), the case in which the court declared unconstitutional the prescribed reading of the Bible at opening exercises in the public schools. Justice Brennan's con-

curring opinion specifically recognized the validity of tax exemptions to religious groups, and though the majority of the court did not join this opinion, undoubtedly because the precise question was not before them, a reading of the majority opinion and the concurring opinion of Justices Goldberg and Harlan leaves little doubt that the court agreed that separation of church and state does not require the abolishing of such tax exemptions.

This Court denied certiorari in a case involving the question of the constitutional basis of tax exemption under the Federal and Maryland Constitutions in *Murray v. Comptroller of the Treasury*, 241 Md. 383, 216 A.2d 897 (1966), cert. den., 385 U.S. 816 (1966). There the Court of Appeals of Maryland held that tax exemption for church properties under the state and Federal constitutions was proper. The Court extended the principle to the properties used for the secular activities as well as religious activities. Justice Reed in his dissenting opinion in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), indicated that it was his opinion not only that tax exemption for religious activities was not prohibited by the Federal Constitution but that:

> "Religious societies depend for their exemptions from taxation upon state constitutions or general statutes, not upon the Federal Constitution, *Gibbons v. District of Columbia*, 116 U.S. 404, 6 S.Ct. 427, 29 L.Ed. 680. (p. 128) . . . Whatever exemptions exist from taxation arise from the prevailing law of the various states. (p. 129) . . . It has never been thought before that freedom from taxation was a perquisite attaching to the privileges of the First Amendment. The national Government grants exemptions to ministers and churches because it wishes to do so, not because the constitution compels." (p. 130)

If one reads the religious clauses of the First Amendment which are cited to establish the principle of separation of church and state, it must be seen that the words:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

do not mention churches.

The real property owned by "churches" was probably minimal within the boundaries of the thirteen states at the time of the adoption of the First Amendment. From this, it can be concluded that the religious clauses of the First Amendment do not cover the problem of the taxation of real property owned by churches and used exclusively for religious purposes. These can then be imposed or exempted under the powers found in the state constitutions–including New York State. Or, as Mr. Justice Brennan observed in his concurring opinion in *Abington School District v. Schempp*, 374 U.S. 203 (1963):

> "Nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. If religious institutions benefit, it is in spite of rather than because of their religious character. . . ." (p. 301-02)

In general, it is clear that the Federal Constitution provides that "Congress shall have the power to lay and collect taxes . . ." (Art. I, Sec. 8, cl. 1–U.S. Constitution) This Court has held that "In the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others." (*Sonzinsky v. United States*, 300 U.S. 506 (1937)). If this is true of the United States, it is true of the States, which have a broader base of power than does the United States. Further, this Court in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937) pointed out:

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule

of equality of taxation . . . . This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation." (p. 509)

"A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution." (p. 510)

It is clear from these generalizations that Congress or the state legislatures, here New York State, have broad powers to tax and equally broad powers to exempt from taxation—there being no clear constitutional inhibition involved. It is important to note that the First Amendment does *not* read: "Congress shall make no law respecting an establishment of a church, . . ." The word "church" is not used once in the entire Constitution or any of its amendments. In addition, no mention is made of taxation or exemption from taxation in the First Amendment. From this fact it could be argued that the founding fathers in drafting the "free exercise" clause were more interested in protecting "religion" than protecting or fostering any of the existing churches. This interpretation finds support in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) which is widely cited as authority for the proposition that government can tax the preacher and the church, but not the right to religious exercise—to tax "churches" in the sense of real property, but not "religion" in the sense of its function.

There are those who will argue that the power to tax the church sanctuary may be exercised to destroy "churches" and hamper religion as the pendulum of permissiveness gains momentum. They fear the legislatures will drive religion and the churches underground. The Christian religion gained its first strength literally, "underground." Perhaps it needs to return to its catacombs to renew its witness. Be that as it may, Justice Frankfurter supplied one answer:

"The power to tax like all powers of government, legislative, executive and judicial alike can be abused

> or perverted. The power to tax is the power to destroy only in the sense that those who have the power can misuse it."

Mr. Justice Holmes disposed of this smooth phrase as a constitutional basis for invalidating taxes when he wrote:

> "The power to tax is not the power to destroy while this Court sits." (*Panhandle Oil Co. v. State of Mississippi ex rel. Knox*, 277 U.S. 218, 223, 48 S.Ct. 451, 453, 72 L.Ed, 857, 56 A.L.R. 583." (p. 137))

There appears to be no useful purpose here to note the many supplementary authorities available for a study in depth of the social, religious and political aspects of the problem of the taxation of churches. A book, *Should Churches Be Taxed?* by D. B. Robertson, published in 1968, gives a comprehensive review of the whole field. Even later we find published a serious study of "the amount of tax-exempt property in this country, what proportions of it are public and private, and, of the latter, what ratios are secular and ecclesiastical, and, finally, how the latter is apportioned among the principal religious divisions." (p. ix– *The Churches: Their Riches, Revenues, and Immunities* by Martin A. Larson and C. Stanley Lowell). And finally, for general background, there is nothing more enlightening than Dr. Leo Pfeffer's *Church, State, and Freedom* (1967).

Returning to the "law" of the case, we respectfully bring to the court's attention the language which it used in *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U.S. 232 (1890), where this Court stated without any equivocation:

> "The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, *if it chooses, exempt* certain classes of property from any taxation at all, such as *churches* *** All such regulations, and those of like character, so

long as they proceed within reasonable limits and general usage, are *within the discretion of state legislatures*, or the people of the State in framing their Constitution." (p. 237) (emphasis added).

CONCLUSION

For the reason stated above, the judgment of the Court of Appeals for the State of New York should be affirmed.

Respectfully submitted,

Protestants and Other Americans United for Separation of Church and State, *amicus curiae*

Franklin C. Salisbury
Attorney for Amicus
1518 K Street, N. W.
Washington, D. C. 20005
Tel. No. (202) 783-3617

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 135

FREDERICK WALZ,

Appellant,

—v.—

TAX COMMISSION OF THE CITY OF NEW YORK,

Appellee.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION, AMICI CURIAE

OSMOND K. FRAENKEL
120 Broadway
New York, N. Y. 10005

MARVIN M. KARPATKIN
1345 Avenue of the Americas
New York, N. Y. 10019

NORMAN DORSEN
New York University Law School
Washington Square South
New York, N. Y. 10003

EDWARD J. ENNIS
8 West 40th Street
New York, N. Y. 10018

JOHN deJ. PEMBERTON JR.
MELVIN L. WULF
BURT NEUBORNE
156 Fifth Avenue
New York, N. Y. 10010

Attorneys for American Civil Liberties Union and New York Civil Liberties Union

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In the

Supreme Court of the United States

October Term, 1969

No. 135

Frederick Walz,

Appellant,

—v.—

Tax Commission of the City of New York,

Appellee.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION, AMICI CURIAE

Interest of Amici

The American Civil Liberties Union and its affiliate, the New York Civil Liberties Union, which file this brief with consent of the parties,* have consistently supported the provision of the First Amendment which forbids the establishment of religion. The Union has appeared in many cases, in this Court and others, to present its view of the Establishment Clause. We do so again in this case, in support of appellant, because we believe that the New York laws involved here which grant tax exemption to churches are a direct violation of the Establishment Clause. We believe our brief will be of substantial assistance to the Court.

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* The letters of consent have been filed with the Clerk of the Court.

Statutes Involved

Sec. 420, Subdiv. 1, of the New York Real Property Tax Law:

> "Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tracted, charitable, benevolent, missionary, hospital, infirmary, educational, public playgrounds, scientific, literary, bar association, library, patriotic, historical or cemetery purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section."

Article 16, Sec. 1 of the New York State Constitution:

> "Exemption from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit."

Question Presented

Whether the exemption from real estate taxation enjoyed by churches in respect to property owned by them and used exclusively for religious purposes violates the Establishment Clause of the First Amendment as made applicable to the States by the Fourteenth.

Summary of Argument

Whatever questions may arise in respect to governmental aid in form of financing in respect to church operations which are partly religious and partly secular, such as the maintenance of hospitals, there is no doubt that governmental subsidy of a church in respect to its purely religious activities violates the Establishment Clause of the First Amendment. It has long been recognized, not merely after *Everson* v. *Board of Education,* 330 U.S. 1 (1947) and *McCollum* v. *Board of Education,* 333 U.S. 203 (1948), that tax exemption is constitutionally equivalent to subsidy and hence at least *prima facie* forbidden by the Establishment Clause. Various justifications for the practice have been offered, but even a moderately close examination reveals that each of these attempted justifications is constitutionally untenable. What remains is the conclusion that justification for such exemption rests on the fact that the practice is widespread and of long standing. The decisions of this Court, however, establish decisively that neither long-standing nor widespread usage makes constitutional a practice which violates a specific provision of the Constitution. Measured by this standard, the Court should declare tax exemption of realty used exclusively for religious purposes to be violative of the Establishment Clause of the First Amendment.

ARGUMENT

Tax exemption granted to churches in respect to realty used exclusively for religious purposes violates the Establishment Clause of the First Amendment made applicable to the States by the Fourteenth.

A. *The Case Against Constitutionality.*

1. Generally

Ever since February 28, 1811, when the author of the First Amendment in his capacity as President of the United States vetoed a bill reserving certain land in Mississippi territory for a Baptist church on the ground that it would violate the Establishment Clause of the Amendment,[1] it has been clear and practically uncontroverted that the government may not make a grant of property or money to a church to be used for support of its religious operations. In words that have almost become a classic gloss on the First Amendment this Court has said on at least four occasions:[2]

---

[1] In his veto message Madison stated that he acted "because the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church comprises a principle and a precedent for the appropriation of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'" 1 Richardson, *Messages and Papers of the Presidents* 489-490 (1896-1899).

[2] *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947); *McCollum* v. *Board of Education*, 333 U.S. 203, 210 (1948); *McGowan* v. *Maryland*, 366 U.S. 420, 443 (1961); *Torcaso* v. *Watkins*, 367 U.S. 488, 492-493 (1962). See also, *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952); *Engel* v. *Vitale*, 370 U.S. 421, 436 (1962); *School District* v. *Schempp*, 375 U.S. 203 (1963).

> The "establishment of religion" clause of the First Amendment means at least this. Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

Uncertainty and disagreement have concededly accompanied application of the principles set forth in this paragraph, specifically where the religious institution receiving governmental aid may be said to be performing a secular as well as a religious function. This difficult question arose even before the above paragraph was first set forth in the *Everson* case in 1947. Thus, in *Bradfield* v. *Roberts,* 175 U.S. 291 (1899), the Court upheld governmental financing of a hospital operated by a religious order on the ground that the healing of the sick is a secular function. In the *Everson* case itself the Court was sharply divided as to

whether governmental financing of transportation to parochial schools served essentially a secular or a religious purpose, the majority deciding in favor of the first alternative.

In *McGowan* v. *Maryland, supra,* the Court was less divided on application of the principle of barring governmental aid to religion. With but one Justice dissenting, it held that while compulsory Sunday observance laws were undoubtedly religious in their origin, the passage of time and change of circumstances had fundamentally altered their character, converting them to secular laws whose purpose is to assure a uniform day of rest and relaxation. The concluding words of the Chief Justice's opinion for the Court show clearly, however, that a law whose purpose it is to aid religion violates the First Amendment. (366 U.S. at 453).

In *Board of Education* v. *Allen,* 392 U.S. 236 (1968) the Court was again divided on the application of the principle, a majority holding that governmental financing of the purchase of secular textbooks for use in parochial schools serves a secular rather than a religious end, just as financing of transportation to such schools. But neither *Allen* nor *Bradfield, Everson* or *McGowan* challenge the validity of the basic principle announced in *Everson,* that government may not finance the purely sectarian operations of a religious institution.[3] Where the contested governmental

[3] It should be noted that in the quoted *Everson-McCollum-McGowan-Torcaso* paragraph the critical words forbid government to "support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to *teach or practice religion.*" A reasonable argument can be made that healing the sick (*Bradfield*), providing for the safety of children on their

activity clearly served only a religious purpose (as in *McCollum, Torcaso, Engel* and *Schempp*) the Court had little difficulty in finding it to be unconstitutional.[4] In *Allen*, the Court stressed that the textbooks supplied to the children in parochial schools were entirely secular and went out of its way to quote from the *Everson-McCollum-McGowan-Torcaso* paragraph "that the Establishment Clause bars a State from passing 'laws which aid one religion, aid all religions, or prefer one religion over another," and bars too "any amount, large or small * * * levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.'" (392 U.S. at 242).

On the same day that the Court announced its decision in *Allen* it handed down its decision in *Flast* v. *Cohen*, 392 U.S. 83 (1968). In that case the Court termed it "palpably unconstitutional conduct" for government to provide funds for the construction of churches. (392 U.S. at 98, footnote 17.) It noted that "Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." (392 U.S. at 103.)

In the light of these and innumerable other authorities that might be cited it may be reasonably said that if any-

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way to school (*Everson*), securing to people one day rest in seven (*McGowan*) or providing their children with secular textbooks (*Allen*) do not constitute the teaching or practice of religion.

[4] In *Torcaso* there was no dissent. In each of the others only one Justice dissented.

thing is settled in constitutional law it is that government may not finance the purely religious operations of religious institutions. That, we suggest, is the only issue in the present case. We are not faced here with uncertainties regarding the financing of operations which serve dual ends, religious and secular. The appellant challenges the constitutionality of the New York statute only insofar as it "grants exemptions from real property taxation to religious organizations on real property *used exclusively for religious purposes.*" (Jurisdictional Statement, p. 3. Emphasis added.) This suit in no way challenges the constitutionality of tax exemption granted to religious institutions in respect to property used for hospitals, children's and old age homes. It is limited to exemption on property used exclusively for religious purposes, no matter how narrow a definition may be accorded to the word "religious."

With the issue so defined, it is difficult to see how tax exemption for religiously used property can be reconciled with the principles set forth in *Everson* and reiterated in all the church-state cases following *Everson.* As we will indicate below, there is widespread agreement if not practical unanimity among legal authorities that if this Court meant what it said in *Everson* and its successors, such exemption cannot stand. But the principles announced in *Everson* were not there created; they go back, as all the Justices in that case agreed, to the very foundation of the Republic and to the adoption of the First Amendment. Religious tax exemption was therefore not made unconstitutional by *Everson,* but if unconstitutional was so from the beginning.

One can hardly escape from this conclusion. "Taxes," said Mr. Justice Holmes, "are what we pay for civilized society," [5] and all persons and institutions that enjoy the benefits of civilized society are at least prima facie legally obligated to pay taxes. The relationship between taxation and the enjoyment of the benefits provided by government is particularly clear in the case of real property. It is the taxes on real property which the government uses to purchase the police, fire, sanitation, safety and other services which the property receives from the government. There is no legal distinction between the government's granting these services gratis and its granting the owner money to buy these services from a private source. If the latter is unconstitutional,[6] so too is the former.

2. Pre-*Everson* authorities

The view described above was recognized long before *Everson*. Certainly, if any one person could be pointed to as the single most authoritative source for the meaning of the First Amendment it would have to be Madison, whom this Court has only recently termed its "leading architect." [7] Madison had no doubt that tax exemption of churches at least in respect to property used exclusively for religious

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[5] *Compania General* v. *Collector*, 275 U.S. 87, 100 (1927) (dissent).

[6] "If a state were to make outright grants to churches out of tax funds in amounts equal to the taxes that would be levied for exemptions, this would clearly violate the First Amendment as construed in Everson." Kauper, "The Constitutionality of Tax Exemptions for Religious Activities," in Oakes, *The Wall Between Church and State* 105 (1963). "Income from discharge of indebtedness" is included in the definition of "gross income" in the Internal Revenue Code, 26 U.S.C. Sec. 61.

[7] *Flast* v. *Cohen*, 392 U.S. at 102.

purposes was inconsistent with the Establishment Clause. In his "Detached Memoranda," discovered and published in 1946, Madison wrote:

> Strongly guarded as is the separation between Religion & Govt in the Constitution of the United States the danger of encroachment by Ecclesiastical Bodies, may be illustrated by precedents already furnished in their short history. (See the cases in which negatives were put by J. M. on two bills passed by Congs and his signature withheld from another. *See also attempt in Kentucky for example, where it was proposed to exempt Houses of Worship from taxes.*)[8]

Immediately after this paragraph, Madison wrote:

> The most notable attempt was that in Virga to establish a Genl assessment for the support of all Xn sects.

Madison then continues with an account of the struggle in Virginia which it is now generally recognized led to and was part of the legislative history of the First Amendment.

The proximity of these two quotations from the Detached Memoranda is, we suggest, of great significance. It shows quite clearly that Madison could find no difference between a law imposing a tax for religious purposes and one exempting houses of worship from taxes.

Others too had similar grave doubts. The Supreme Court of Indiana stated:

> It is easier to admire the motives for such exemption than to justify it by any sound argument. • • •

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[8] Fleet, Madison's "Detached Memoranda", 3 *William and Mary Quarterly* 534, 555 (1946). (Emphasis added.)

> Only let the theory be carried a little further; let a specific tax be levied to support houses of worship, and it will speedily attract public attention. Yet the one is precisely the same in principle as the other. * * * To say that such is the practice of civilized nations, is not sound. It is rather an apology for a departure from principle. *Orr* v. *Baker,* 4 Ind. 86 (1858).

In 1930, seventeen years before *Everson,* an authority on tax exemption wrote:

> The founders of our government have usually been credited with having exercised a remarkable amount of foresight and judgment. Among other things they provided for the separation of church and state. Suppose some ambitious legislator, anxious to assist the church and to increase the salaries of underpaid clergymen were to sponsor a bill to pay each church from state funds, one-half the pastor's salary. Immediately he would be met with the objection that this were an involvement of church and state, the church would become involved in entangling political alliances, and that the only way to maintain an independent church policy is to keep it free from political influence.
>
> In fact, however, the state does contribute to the support of the church through the grant of tax exemption. A church and site in a city are worth $250,000, and if this were assessed and taxed on the same basis as other real estate, it would pay a tax, say, of $5,000 a year. But since exemption from the payment of this sum has been granted, the state has, in effect, subsidized the church. Hunter, Tax Exemption—A Subsidy, 8 National Tax Magazine 332 (1930).

Three years later, Zollman, an authority generally favorable to state aid to religion, pointed out in his authoritative text *American Church Law,* that

> This exemption is not so easily justified on principle as it is supported by authority. * * * While charity and education may be said to be established in the policy of the state, an establishment of religion is expressly prohibited by the Federal Constitution and impliedly by all but one of the State Constitutions. The strictly religious features of church societies can therefore furnish no valid reason for this exemption. (P. 327.)

The following year, another authority on taxation wrote:

> Since the fundamental laws that have been accepted in the United States provide for the separation of Church and State, and since the exemption of church property from taxation constitutes a subsidy to the church associations, it is clear that what has been expressly prohibited is being indirectly carried on and that the courts and a large part of the public are sanctioning it. Stimson, The Exemption from Taxation in the United States, 18 Minn. L. Rev. 411, 422 (1934).

3. Post-*Everson*

These, and other authorities which might be cited,* indicate quite conclusively that long before *Everson* there was widespread and authoritative opinion that tax exemptior

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* E.g., Adler, "Historical Origin of the Exemption of Charitable Institutions," Westchester County Chamber of Commerce, "Tax Exemption on Real Estate," p. 76 (1922); *Franklin Street Society* v. *Manchester,* 60 N.H. 342, 349 (1880).

for houses of worship could not easily be reconciled with the American principle of church-state separation. The exposition and definition of this principle in *Everson* and its successors simply emphasized what had been recognized earlier. This has widely been acknowledged by authorities who have examined these decisions.[10] Their views have been summarized by one writer as follows:

> Objective consideration of the opinions in the Everson and McCollum cases leads to the conclusion that tax exemption for churches violates the First Amendment as interpreted by these decisions. • • • This conclusion can hardly be avoided if the language of those is to be given its fair meaning. Under these decisions government aid to religion, even if not preferential or discriminatory is barred by the Constitution, and few would deny that exemption of church property constitutes governmental aid. • • • [11]

Even those authorities who favor tax exemption for churches find it difficult if not impossible to reconcile it

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[10] Pfeffer, *Church, State and Freedom*, 217-218 (Rev. ed., 1967); Paulsen, "Preferment of Religious Institutions in Tax and Labor Legislation, 14 *Law and Contemporary Problems* 144 (1949); Van Alstyne, "Tax Exemption of Church Property," 20 *Ohio L. J.* 461 (1959) Note, "Constitutionality of Tax Benefits Accorded to Religion," 49 *Col. L. Rev.* 968 (1949); Hurvich, "Religion and the Taxing Power," *Univ. of Cin. L. Rev.* 531 (1966); Comment, "Constitutionality of Tax Exemption Accorded American Church Property," 30 *Alb. L. Rev.* 58, 68-69 (1966); Note, 3 *Rutgers L. Rev.* 115 (1949); Note, "Taxation of Religious Organizations," 5 *Vill. L. Rev.* 255 (1960); Comment, "State Tax Exemption and the Establishment Clause," 9 *Stan. L. Rev.* 366 (1957).

[11] Pfeffer, *Church, State and Freedom*, 217-218. According to John C. Bennett, president of Union Theological Seminary, tax exemption is "the most remarkable of all forms of aid to religious bodies." Bennett, *Christians and the State*, 232 (1958).

with what was said in *Everson* and *McCollum*.[12] Generally, they seek to accomplish this by asserting that "the no-aid principle cannot be taken literally,"[13] or to put it less euphemistically, that the Court did not mean what it said in *Everson-McCollum*. We prefer to believe that the Court meant what it said in these cases. Certainly it has had ample opportunity to repudiate them. Not only has it not done so but in practically every case since *Everson* it has reiterated the classic paragraph either in whole or in the critical part.[14]

But even if we were to disregard the no-aid test and apply the test announced in *Schempp* and followed in *Allen*, the case for the constitutionality of tax exemption for churches is no stronger, if it is not in fact weaker. In *Schempp* the Court set forth the following test for determining constitutionality under the Establishment Clause:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a

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[12] Kauper, *op. cit.*, p. 115; Drinan, *Religion, the Courts and Public Policy* 8 (1963).

[13] Kauper, *op. cit.*, p. 115. Both Kauper and Drinan seek to support this conclusion by noting that the Court had dismissed for want of a substantial federal question the appeal in *General Finance Corp.* v. *Archette*, 369 U.S. 423 (1962), wherein the state court had upheld constitutionality. Whatever probative value that fact might have had is vitiated by the Court's noting probable jurisdiction in the present case.

[14] See cases cited: footnote 2 *supra*.

> primary effect that neither advances nor inhibits religion. 374 U.S. at 222.

This can hardly be interpreted as a repudiation of *Everson*, but lest there be any doubt on that score let it be noted that the Court *cited Everson as its authority* for this test, and in its opinion (at p. 220) quoted the critical "no-aid" sentence from *Everson*. Nevertheless, we will examine the *Schempp* test without regard to its source and independently of any of the church-state cases that preceded it.

In *Schempp* the Court applied this test to declare unconstitutional devotional Bible reading and prayer recitation in the public schools. The Court rejected a contention that the purpose of the practice was the secular one of promoting moral values. It held that its purpose and primary effect was the advancement of religion.

In *Allen* the Court upheld the constitutionality of a statute providing for the free use by parochial school children of *secular* textbooks purchased with public funds. The Court stated that in the absence of evidence to support it, it could not accept the plaintiff's claim that "all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." 392 U.S. at 248.

Applying the *Schempp* test to the present case we cannot see how tax exemption for realty used *exclusively* for religious purposes can stand. What can be the purpose of such an exemption except the advancement of religion? What can be its primary effect except the advancement of religion? We are, we repeat, not faced here with any

question of dual purpose, with activities which are partly religious but also partly secular. There is therefore no occasion, as there was in both *Schempp* and *Allen,* to weigh one against the other to determine which is primary and which is secondary. If, we submit, tax exemption for property used exclusively for religious purposes does not advance religion, then neither does a direct subsidy, and nothing remains of the Establishment Clause.

B. *Attempted Constitutional Justification.*

Father Robert Drinan, an ardent supporter of tax exemption for churches, has been frank enough to admit that "No entirely satisfactory rationale for tax exemption has ever been stated in any American judicial decision."[15] In this part of our brief, we propose to examine into the validity of some of the more frequently asserted constitutional justifications for exemption of church property from taxation. The conclusion at which we arrive is that the reason that no "entirely satisfactory rationale" for the practice has been stated in any American judicial decision or indeed elsewhere is simply that none exists.

1. Aid to religion is constitutional if it is non-preferential

In *McGowan,* the Court recognized that the origin of Sunday laws was religious and their objective religious. Even after the adoption of the national and state constitutions, all of which by 1833 contemplated a separation of church and state, some less sophisticated courts found it

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[15] Op. cit. p. 9.

quite proper for the state to aid and protect the Christian religion by enactment of Sunday laws.[16]

The same rationale for tax exemption for churches is to be found in early cases. Thus, one court stated:

> It is presumed that in the nineteenth century, in a Christian land, no argument is necessary to show that church purposes are public purposes • • • To deny that church purposes are public purposes is to argue that the maintenance, support, and propagation of the Christian religion is not a matter of public concern. Our laws, although they recognize no particular religious establishment, are not insensible to the advantages of Christianity, and to extend their protection to all in that faith and mode of worship they may choose to adopt.[17]

Obviously, in the twentieth century this rationale cannot be accepted. (In *McGowan*, the Court was able to dispose of it by holding that the present purpose and effect of Sunday laws is no longer to aid Christianity but to protect the general welfare, but this is patently not available in respect to a law which exempts property used exclusively for religious purposes.) Hence, the rationale was broadened, and it was contended that while aid to Christianity

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[16] Thus, a New York court found it proper "that the Christian religion and its ordinances [are entitled] to respect and protection as the acknowledged religion of the people • • •. It would be strange that a people, Christian in doctrine and worship • • • should in their zeal to secure to all the freedom of conscience which they valued so highly, solemnly repudiate and put beyond the pale of the law, the religion which is as dear to them as life. • • • Religious tolerance is entirely consistent with a recognized religion." *Lindenmuller* v. *People*, 33 Barb. (N.Y.) 548 (1861).

[17] *City of Hannibal* v. *Draper*, 15 Mo. 634 (1852).

alone might be unconstitutional, aid to all religions non-preferentially is not.[18]

This contention was presented in the oral argument by counsel for the appellee in the *McCollum* case in the following colloquy:

> Mr. Justice Black: Do I understand you to take the position that if the State of Illinois wanted to contribute five million dollars a year to religion they could do so, so long as they provided the same to every faith?
>
> Mr. Franklin: Yes, and the State of Illinois does contribute five million dollars annually to religious faiths, equally, and more than five million dollars, and has during its entire history.
>
> Mr. Justice Black: How does it do it?
>
> Mr. Franklin: By tax exemption specifically granted to religious organizations.[19]

In *McCollum*, the Court rejected the no-preference theory as it did consistently in all later church-state cases until it could say in *Schempp* that "[s]uch contentions, in the light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises."

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[18] O'Neill, *Religion and Education Under the Constitution* (1949); Brady, *Confusion Twice Confounded* (1955); Parsons, *The First Freedom* (1948); Corwin, "The Supreme Court as National School Board," 14 *Law and Contemporary Problems* 3 (1949); Murray, "Law or Prepossession?", in McCloskey, *Essays in Constitutional Law* 316 (1957).

[19] Quoted in O'Neill, *op. cit.*, p. 225. Though the total financial benefit granted to religious institutions through tax exemption is not easily calculable, a rough estimate can be derived from the fact that the value of *new* construction of religious buildings in 1966 alone is said to be $1,174,000,000. Year Book of American Churches for 1968 (National Council of Churches) 215.

(374 U.S. at 217.) Hence, tax exemption for churches can no longer be justified on the ground that non-preferential aid to all religions does not violate the Establishment Clause.

Yet, Mr. Franklin's assertion that through tax exemption "the State of Illinois does contribute five million dollars annually to religious faiths" seems unanswerable. It follows from this that if the practice of tax exemption for churches does not support the contention that non-preferential aid to religion is constitutional it can only be because the practice itself is unconstitutional.

2. Exemption is an indirect aid

The argument has been made that while a direct subsidy to a church is unconstitutional, exemption from taxation is an indirect benefit and hence permissible.[20] The position was stated by Professor Kauper as follows:

> • • • The Court has passed upon school released-time plans for religious instruction of children, upon Sunday-closing laws, and recently upon a prayer prescribed for use in public schools. But all these cases, while dealing with the non-establishment clause, were concerned with the affirmative use of state police and tax powers to aid religion or promote religious practices. They are, therefore, not directly applicable to tax exemptions which involve indirect aid.[21]

In support of this argument, it has been suggested that *Everson* (as well as its predecessor, *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370 (1930) and its

[20] 3 Stokes, *Church and State in the United States* 423 (1950).

[21] Kauper, *op. cit.* at p. 106.

successors, *McGowan* and *Allen*) supports the constitutionality of indirect aid to religion.[22]

The difficulty with this argument is that it misconceives the meaning of "indirect" and the holding of these cases. To the extent that these decisions support the assertion that indirect aid to religion is constitutional, the term "indirect" means incidental or not primarily purposed. In each of these cases, the purpose of the challenged statute, as determined by this Court, was to further a secular end, such as ensuring the safety of children, providing them with a secular education or ensuring a day of rest for workers. The benefit accruing to religion was simply an incidental by-product of a law seeking to advance a secular endeavor. This is obviously not the case in respect to a statute which is limited to one objective, namely, relieving churches of the obligation to pay for services provided to them by the state.

We can see no way to distinguish constitutionally between a direct subsidy to churches and tax exemption. As we have indicated, the author of the First Amendment found no distinction between them. Nor have any but a few constitutional authorities been able to do so. Such a distinction can be accorded constitutional efficacy, we submit, only by elevating fiction over reality.

3. Churches, like hospitals and orphanages, perform an important public service and like them can be exempted from taxation

This argument has been well stated by one state court:

> Exemptions are granted on the hypothesis that the association or organization is of benefit to society, that

[22] Robertson, *Should Churches Be Taxed?* 217-218 (1968).

it promotes the social and moral welfare, and, to some extent, is bearing the burdens that would otherwise be imposed upon the public to be met by general taxation.[23]

There can be no quarrel with this reasoning insofar as it relates to social welfare operations conducted by churches, as long as they are operated entirely on a nonsectarian basis. The tax exemption of a denominational hospital operated as a secular institution is as unobjectionable as direct financial grants to such institution.[24] The hypothesis has no relevance, however, to exemption of property used exclusively for religious purposes. It is undeniable that if private organizations will not care for orphaned children or the destitute ill, the state will be required to do so; and thus the private organizations are performing a function that the government would be required or at least would be constitutionally empowered to perform. It is therefore as proper for the state to exempt such organizations from taxation as it is to make direct subsidies to them.

Under our system of separation of church and state, however, it is not within the jurisdiction of government to provide worship if private groups fail to do so. To say that churches perform a public function is therefore misleading. And if it is urged, as it frequently has been, that the promotion of morals and ethics by churches is beneficial to the public and is necessary to the advancement of civilization and the welfare of society,[25] it is inconsistent to concede

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[23] *Young Men's Christian Association* v. *Douglas County*, 60 Neb. 642 (1900).

[24] *Bradfield* v. *Roberts*, 175 U.S. 291 (1899).

[25] Saxe, *Charitable Exemption from Taxation in New York State* 45-46 (1933); Drinan, *op. cit.*, p. 9. ("It may be that the only

that the same considerations do not justify direct grants to churches.

The argument that devotional Bible reading and prayer recitation can be sponsored by public school authorities because they promote morals and good citizenship was specifically and emphatically rejected by this Court in *Schempp*. It is, we suggest, no more valid to sustain aid to religion in the form of tax exemption than it is to sustain aid in the form of school sponsored prayer.

4. Equal treatment for churches

Professor Kurland has suggested that the Establishment Clause forbids government to impose legal distinctions based upon religion either for benefit or detriment.[26] Hence, a statute exempting nonprofit organizations but which by its terms or judicial interpretation excludes religious nonprofit organizations would be unconstitutional. The Kurland doctrine has not won the approval of any court,[27] but a somewhat similar though less expansive claim has been made in respect to tax exemption for churches. According to this claim, a state is not constitutionally required to include tax exemption for churches in its program of exemption for nonprofit organizations but is not constitutionally forbidden to do so if it wishes. In other words, if a state

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possible ultimate justification is a public policy consciously encouraging religion as a valuable aid to good citizenship."); Antieau, Carroll and Burke, *Religion Under the State Constitutions* 169 (1965) ("Religion has provided this society with the moral guides by which our individual and public conduct is measured.")

[26] Kurland, *Religion and the Law: Of Church and State and the Supreme Court* 112 (1962).

[27] See Pfeffer, "Religion Blind Government," 15 Stanf. L. Rev. 389 (1963).

does exempt nonprofit associations from taxation, it may accord equal treatment to churches.[28]

The difficulty with this rationale is that placing all nonprofit organizations under a single umbrella does not relieve any of them of the need to justify its right to be under the umbrella. Nonprofit associations (and even profit-making ones) which serve secular purposes may be constitutionally exempted from taxation because they can be constitutionally subsidized out of public funds. But the First Amendment bars governmental financing of church operations and the bar cannot be evaded by designating the beneficiaries of the governmental financing as nonprofit associations rather than specifically as religious associations.

Can it be doubted that a state law making direct grants of funds to educational institutions cannot be constitutionally applied to include theological seminaries in its operation? In *Allen* (as in its predecessor *Cochran*), the Court emphasized that the textbooks supplied to children in parochial schools were secular textbooks. But if the umbrella theory is valid, why the emphasis? Would not an inclusive law providing public funds for whatever textbooks are used in the schools be equally constitutional?

In many European countries, including some Communist ones,[29] priests enter the public school classrooms to teach

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[28] *Murray* v. *Comptroller of the Treasury*, 241 Md. 383, 216 A. 2d 897, *cert. den.* 385 U.S. 816 (1966); "Congress in granting tax exemption under this statute, like most of the states, was giving expression to a broad legislative purpose to grant support to elements in the community regarded as good for the community." *Washington Ethical Society* v. *District of Columbia*, 249 F. 2d 127, 129 (1957).

[29] Pfeffer, *Church, State and Freedom*, 64-65 (Rev. 1957 ed.).

religion to children whose parents wish it, and are paid by the government just as are other teachers. Under the umbrella theory, this would be constitutional in the United States, but it is more than doubtful that any court in the United States would uphold the validity of such a practice.

The crux of the matter was stated by Mr. Justice Jackson in *Everson* in the following words:

> • • • It [a state] may socialize utilities and economic enterprises and make taxpayers' business out of what conventionally had been private business. It may make public business of individual welfare, health, education, entertainment or security. But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character. There is no answer to the proposition • • • that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom • • • . 330 U.S. at 26 (dissenting opinion).

The basic assumption of the umbrella theory is and must be that there is a fundamental constitutional difference between aid to religion in the form of a direct subsidy of public funds and aid in the form of relieving religious institutions of the obligation to pay in the form of taxes for services it receives from the state. As we have indicated, the author of the First Amendment found no such

difference and neither have most constitutional authorities who have examined the question.

5. Tax exemption is a permissible accommodation to the claims of religious liberty

Another argument in support of tax exemption asserts that while the claim of churches to exemption under the Free Exercise Clause of the First Amendment may be going too far, it is nevertheless within the province of the legislature to balance the competing claims of free exercise and no-establishment and decide in particular cases in favor of the former. There is, according to this theory, a gray area betwen free exercise and no-establishment wherein the Constitution permits legislative discretion.[30]

Conscientious objection to military service is cited as an example. A person whose religious beliefs do not permit participation in armed combat does not, according to this Court, have a constitutional right under the Free Exercise Clause to be exempt from military service.[31] On the other hand, it is within the constitutional power of Congress to grant such exemptions.[32] Similarly, this Court has held that the First Amendment's Free Exercise Clause does not entitle a Sabbatarian to be exempt from a state's compulsory Sunday closing law,[33] but a statutory exemption is not unconstitutional.[34]

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[30] Kauper, *op. cit.*, p. 112.

[31] *Hamilton* v. *Regents of the University of California*, 293 U.S. 245 (1934); *United States* v. *Schwimmer*, 270 U.S. 644 (1929). But see *United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass. 1969), prob. jurisd. noted 38 U.S.L.W. 3127 (Oct. 13, 1969).

[32] *Selective Draft Law Cases*, 245 U.S. 366 (1918).

[33] *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *Gallagher* v. *Crown Kosher Market*, 366 U.S. 617 (1961).

[34] *Commonwealth* v. *Arlan's Department Store*, 357 S.W. 2d 708 (Ky. 1961), appeal dismissed for want of a substantial federal question, 371 U.S. 218 (1962).

By the same reasoning, it is argued, a church does not have a constitutional right to be exempt from taxation but the legislature does have the constitutional power to grant such exemption in the interests of religious liberty.

This argument mistakes the rationale of the cases upon which it relies. In each of them, the action of the legislature in commanding military service or abstention from business on Sunday does in fact impair the free exercise of religion. The impairment has been held constitutional because the free exercise of religion must on occasion yield to what is deemed paramount societal interests, such as national defense and the general welfare. But where the legislature has determined that the interests of national defense or of general welfare would not be seriously threatened by an exemption based upon a claim of religious obligation, the courts will accept the legislature's judgment.

This reasoning, however, is applicable only where there is a bona fide substantial claim that adherence to the general law would violate religious conscience. It is not applicable where the only "violation" is claimed freedom from taxation. The reasoning would be relevant in the case of one who, like a religiously motivated Thoreau, believed that payment of taxes to government violated God's command. There is no such claim in the present case; nor is the challenged statute limited to those who, like the conscientious objector in the *Selective Draft Law Cases* or the Sabbatarian in the *Arlan's Department Store* case, assert bona fidedly that compliance with the law violates his religious conscience or penalizes him for following his religious conscience. These cases, therefore, are irrelevant to the issues before this Court in the present case.

6. Tax exemption is required by the Free Exercise Clause

By far the most expansive justification for tax exemption is the claim that it is required by the Free Exercise Clause and that any effort by a legislature to impose a tax upon church property used exclusively for religious purposes would be unconstitutional. This claim was asserted by intervening religious groups in *Murray* v. *Comptroller, supra,* but the Maryland Court of Appeals found it unnecessary to pass upon it, holding instead that exemption was at least legislatively permissible.

The claim reappears in this appeal in the brief *amicus curiae* of the National Council of the Churches of Christ in the United States of America. It is not claimed that it would violate the conscience of the churches to pay a tax to the secular government; it would be difficult for such a claim to be made by a church whose Founder, in response to a question whether it was lawful to pay taxes to the government, said "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's" (Matth. 22:21). Rather, the claim is that to tax property used for religious purposes is in effect a tax upon the exercise of religion which was declared unconstitutional in *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943). A house of worship, it is asserted, is "so intimately connected with religious exercise that to levy a direct tax upon the value of such property would constitute a tax on the exercise of religion and have the same effect as that tax upon the itinerant evangelist which the Court found unconstitutional in Murdock." [35]

The brief of the National Council of Churches in the present case similarly relies almost exclusively on *Murdock*

[35] Brief of Temple Emanuel in *Murray* v. *Comptroller,* quoted in Robertson, *op. cit.,* at 223.

where the Court invalidated as a violation of the Free Exercise Clause, a provision which required religious colporteurs to pay a license tax as a condition to the pursuit of their activities. The brief (at p. 8-9) quotes the following from *Murdock*:

> The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. *Magano Co.* v. *Hamilton,* 292 U.S. 40, 44-45, and cases cited. Those who can tax the exercise of religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which survived from the Reformation. 319 U.S. at 112.

"The taxation of church edifices used for religious purposes," the brief continues (at p. 9) "would even more obviously be 'a flat tax imposed on the exercise of privilege granted by the Bill of Rights', or, to put it more emphatically, on a right older than the Bill of Rights and guaranteed by it."

Reliance on *Murdock,* we suggest, is misplaced. The Court in that case, apparently anticipating the claim of religious freedom in respect to a tax on the income of a clergyman or on the property of a church, said:

> We do not mean to say that religious groups and the press are free from all financial burdens of government. See Grosjean v. American Press Co., 297 U.S. 233,

> 250. We have here something quite different, for example, from a tax on the income of one who engages in religious activities *or a tax on property used or employed in connection with those activities.* It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. * * * (319 U.S. at 112) (Emphasis added.)

To hold that a tax upon the land and buildings of a church cannot constitutionally be levied by reason of the Free Exercise Clause would lead to impossible results. Freedom of religion is not the only freedom guaranteed by the First Amendment; so too is freedom of speech and the press, freedom of petition and assembly. A state may not consistently with the First Amendment impose a tax on the privilege of publishing a newspaper,[36] but does this mean that a state may not tax the land and plant of the New York Times? Compare *The Associated Press* v. *National Labor Relations Board,* 301 U.S. 103 (1937); *Associated Press* v. *United States,* 326 U.S. 1 (1945). Is a state forbidden to tax (uniformly, of course, with other buildings) an assembly hall? In *Joseph Burstyn Inc.* v. *Wilson,* 343 U.S. 495 (1952), the Court held that motion pictures are a form of communication protected by the First Amendment. Does this mean that a state may not tax movie theatres?

A tax on property used in connection with worship is not a tax on the privilege of worshipping, any more than a tax on a printing plant, assembly hall or movie theatre is a tax on the privilege of printing, assembling or communicating. It is a means whereby the community obtains compensation for the services it renders to the individual

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[36] *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936).

or association exercising the privilege. The First Amendment does not oblige the community to give something for nothing, even to a church. As Mr. Justice Douglas observed:

> The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money the better to exercise them. *Sherbert* v. *Verner,* 374 U.S. 398, 412 (1963) (concurring opinion).

7. Exemption is long standing and widespread and therefore must be constitutional

By far the most frequent argument in support of tax exemption for church property is that the practice is so widespread and so long standing that it is inconceivable that it could be unconstitutional. "Tax exemption for churches and related institutions," says Father Drinan, "has always existed in American law • • • ."[37] The Court of Appeals in *Murray* v. *Comptroller, supra,* quotes Mr. Justice Holmes[38] that "if a thing has been practiced for two hundred years, it will need a strong case for the Fourteenth Amendment to affect it." The New York Court of Appeals in the present case starts its short *per curiam* opinion by saying that tax exemption for church property is "[f]irmly embedded in the law of this State."

What may be called the historical argument has been expressed perhaps best by Professor Kauper in the following language:

> The first argument in support of the constitutionality of tax exemptions is the very solid consideration that

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[37] Drinan, *op. cit.* at p. 7.

[38] In *Jackman* v. *Rosenbaum* Co., 260 U.S. 22, 31 (1922).

tax exemption for churches are universal in this country and have a long history. This history cannot be explained solely as a carry-over from the earlier days of established churches. These exemptions are found also in states formed and organized after churches had been disestablished in the colonial states. In many states they have also been recently amended to extend the scope of the exemption. This suggests a rationally conceived and deep-seated policy, and not an accidental or vestigal survival of outmoded practices. The impressive historical argument assumes even greater significance when the attempt is made to use the First Amendment's ambiguous language to outlaw tax exemptions for churches on the theory that the Fourteenth Amendment, adopted in 1868, made it applicable to the states. Whether or not the latter theory rests on more than myth or spurious historical interpretation, it is pertinent to note Justice Holmes's observation that the Fourteenth Amendment was not intended to undo two hundred years of history.[39]

The relationship between tax exemption and church establishment referred to by Professor Kauper has long been recognized. Zollman explains it as follows:

> • • • Church and state in the early days were generally not separated. The church was established. It was a public agency, a municipal corporation like a city, village, or town. A taxation of church property would therefore have been but an idle ceremony. As well might a courthouse or a city hall be taxed. Church property, being public property supported by public taxes was inherently exempt. So long as towns "exer-

[39] *Op. cit.* at p. 110.

> cised parochial functions, and raised taxes for supporting and maintaining houses of public worship, those places were exempt from taxation as public property by the nature of things, and not by the Constitution or by statute." Franklin Street Society v. Manchester, 60 N.H. 342, 349 (1880).[40]

Tax exemption for church property is not the only institution of church establishment dating from colonial times that has reached this Court for testing under the Establishment Clause. The Court has similarly been called upon to pass upon the constitutionality of Sunday laws. Unlike Professor Kauper and many other authorities and courts, the Court has not relied upon either the age (or ubiquity)[41] of Sunday laws to sustain their constitutionality. On the contrary, the Court in *McGowan* rested constitutionality not upon tradition but upon a break with tradition. The Court held that while the origin of Sunday laws was establishmentarian, that chapter in its history had come to an end, and a new chapter based upon secular values had begun. Mr. Chief Justice Warren, in the concluding words made it clear that if the purpose of a contemporary Sunday law were what it was in colonial times the law would be unconstitutional.

But, as we have indicated earlier in this brief there has been no such break in the history of tax exemption for churches in respect at least to property used exclusively for religious purposes. Sunday laws have become secular

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[40] *Zellman, op. cit.* at p. 329.

[41] Sunday laws are almost as ubiquitous as church tax exemption laws. Pfeffer, *Church, State and Freedom*, 273 (Rev. ed., 1967). The laws are listed in the concurring opinion of Mr. Justice Frankfurter in *McGowan*, 366 U.S. at pp. 543-554.

laws; church tax exemption laws have not as they would have, for example, if all churches had become non-sectarian community centers.

In the quoted paragraph Professor Kauper seeks to buttress the argument based upon history by noting that states formed after churches were disestablished also enacted exemption laws. The same argument was presented by the Maryland Court of Appeals in *Murray* v. *Comptroller, supra,* in the following words:

> • • • It is significant, in our opinion, that the act exempting church property in the District of Columbia from taxation • • • was first adopted by the corporation of the City of Washington (Act of Oct. 6, 1802, ch. 51, Washington City Laws. 1802-03) under authority delegated by Congress (Act of May 3, 1802, ch. 53, 2 Stat. 195), approximately eleven years after the adoption of the first ten amendments. Congress thereafter amended the act incorporating the City of Washington but permitted the exemption to remain (Act of Feb. 24, 1804, ch. 14, 2 Stat. 254). It seems a reasonable assumption that members of the Congress in the early years of the nineteenth century were personally familiar with the purposes and scope of the First Amendment, and did not regard exemption as inconsistent therewith.

An argument for constitutionality based on the proximity of date of enactment of the challenged statute to the adoption of the constitutional provision under which it is challenged is a rather weak one. The first decision of the Court declaring unconstitutional a law of Congress[42] was

[42] *Marbury* v. *Madison, 1 Cranch 137* (1803).

one invalidating a statute (the provision in the Judiciary Act of 1789 empowering the Supreme Court to issue writs of mandamus) enacted almost before the ink was dry on the proclamation declaring that the Constitution had been adopted. The Sedition Act of 1798 was enacted only seven years after the First Amendment became part of the Constitution, yet it is highly doubtful that the Court would today uphold its constitutionality.

Either expressly or implicitly, this Court has rejected both the historical and proximity argument in determining constitutionality, as is indicated from the following examples:

(1) *Malapportionment.* Even before the Constitution was adopted, legislative malapportionment existed and was widespread. Madison referred to it in 1786 in his Memorial and Remonstrance Against Religious Assessments.[43] This fact did not deter the Court from declaring in *Baker* v. *Carr,* 369 U.S. 186 (1962) and its numerous successors, that malapportionment is unconstitutional.

(2) *Public school sponsored Bible reading and prayer recitation.* This is a practice which goes back to the very beginning of the public school system.[44] Nevertheless, the Court held the practice to be unconstitutional in *Engel* and *Schempp.*

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[43] " 'The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly.' But the representation must be made equal, before the voice either of the Representatives or of the Counties, will be that of the people." Appendix to *Everson,* 330 U.S. at 70-71.

[44] Pfeffer, *Church, State and Freedom,* 436 (Rev. ed., 1967).

(3) *Racial segregation in public schools.* Segregated public education was widespread, North and South, when the Fourteenth Amendment was adopted,[45] and remained so long thereafter. Nevertheless, the Court found the practice unconstitutional in *Brown* v. *Board of Education,* 347 U.S. 483 (1954).

(4) *Income tax.* For a century after *Hylton* v. *United States,* 3 Dall. 171 (1796), it was universally assumed that a tax on personal property or the income from personal property was not a direct tax and therefore was constitutional. In *Pollock* v. *Farmers' Loan & Trust Co.,* 158 U.S. 601 (1895), the Court held it to be unconstitutional.[46]

(5) *Federal common law.* For a century after *Swift* v. *Tyson,* 16 Pet. 1 (1842), it was universally assumed that Federal courts were not constitutionally bound in diversity cases to follow the state courts' interpretation of the common law. In *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938) the Court held to the contrary.

Other illustrations can be cited, but we believe these are enough to establish that neither age nor ubiquity proves constitutionality. Nor do they relieve this Court of the responsibility for deciding for itself whether tax exemption for church property used exclusively for religious purposes is or is not constitutional. Should the Court do so, we submit, it cannot but come to the conclusion that the practice cannot be reconciled with the Establishment Clause of the First Amendment.

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[45] *See Roberts* v. *City of Boston,* 5 Cush. 198 (1850); *Plessy* v. *Ferguson,* 163 U.S. 537 (1896).

[46] We need hardly note that we do not necessarily agree with the correctness of the Court's decision in that case.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be reversed and the challenged statute be declared unconstitutional.

Respectfully submitted,

Osmond K. Fraenkel
120 Broadway
New York, N. Y. 10005

Marvin M. Karpatkin
1345 Avenue of the Americas
New York, N. Y. 10019

Norman Dorsen
New York University Law School
Washington Square South
New York, N. Y. 10003

Edward J. Ennis
8 West 40th Street
New York, N. Y. 10018

John deJ. Pemberton Jr.
Melvin L. Wulf
Burt Neuborne
156 Fifth Avenue
New York, N. Y. 10010

Attorneys for American Civil Liberties Union and New York Civil Liberties Union

October 1969.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 135

FREDERICK WALZ,

Appellant,

—v.—

TAX COMMISSION OF THE CITY OF NEW YORK,

Appellee.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF OF APPELLANT

FREDERICK WALZ
Appellant Pro Se
60 East 42nd Street
New York, N. Y. 10017

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REPLY BRIEF OF APPELLANT

The tax exemption complained of is in violation of the Establishment Clause and the Free Exercise Clause of the First Amendment.

The real property tax exemption involved here is provided by Article 16, Sec. 1 of the New York Constitution and by Sec. 420 of the Real Property Tax Law (App. Br. p. 3).

The tax exemptions provided therein for religious organizations are in violation of the First Amendment, which reads "Congress shall make no law respecting an establishment of religion. . . ." This clause has been interpreted

by this Court in *Everson* v. *Bd. of Education,* 330 U.S. 1, 11, as follows:

> "The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions . . ."
>
> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion . . . New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church" (pp. 15-16).

The dissent of four justices is quoted from in part as follows:

> "It (the First Amendment's object) was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion" (pp. 31-2).
>
> "The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes" (p. 33).

Referring to Madison,

"In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation. Not even 'three pence' contribution was thus to be exacted from any citizen for such a purpose" (p. 40).

"Legislators are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small. . . . The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state" (pp. 52-3).

McGowan v. *Maryland,* 366 U.S. 442: "It (this Court) has found that the First and Fourteenth Amendments afford protection against religious establishment far more extensive than merely to forbid a national or state church." The Court then referred to the "establishment of religion" clause definition in *Everson* v. *Board of Education* (330 U.S. 15-16). This opinion was reaffirmed in *Torcasso* v. *Watkins,* 367 U.S. 492-3; in *McCollum* v. *Board of Education,* 333 U.S. 203 and in *Abington* v. *Schempp,* 374 U.S. 217. In *Abington* the concurring opinion of Douglas, *J.,* included: "The most effective way to establish any institution is to finance it" (p. 229).

Mr. Justice Reed declared in *McCollum* v. *Board of Education,* 333 U.S. 203 (1948): "This explains the well-known fact that all churches receive 'aid' from Government in the form of freedom from taxation."

Mr. Justice Douglas in *Engel* v. *Vitale,* 370 U.S. 421 (1962): "The point for discussion is whether the Government can constitutionally finance a religious exercise. Our

system at the federal and state levels is presently honeycombed with such financing. Nevertheless, I think it an unconstitutional undertaking whatever form it takes."

The expression "funds and facilities" has also been used in this Court to illustrate "Government aid."

"There is no power in our Government to make one bend his religious scruples to the requirements of tax law." Mr. Justice Douglas in *First Unitarian Church* v. *County of Los Angeles,* 357 U.S. 545 (1958).

Appellant's adversaries have cited a number of decisions of this Court striking down licenses, taxes and other encroachments on the exercise of civil liberties: *Speiser* v. *Randall,* 357 U.S. 513 (1958) which involved freedom of speech; *Murdock* v. *Penna.,* 319 U.S. 113 (1943) and *Follett* v. *McCormick,* 321 U.S. 574 (1944) both involving colporteurs; *Sherbert* v. *Verner,* 374 U.S. 405 (1963) involving Sabbath observance; *Grosjean* v. *American Press,* 297 U.S. 233 (1936), involving freedom of the press.

These cases all involved restrictions on civil rights activities, as distinguished from taxation on the ownership of property. This distinction was clearly drawn in *Grosjean.* There Louisiana imposed a tax on advertising in the press. This was held to be an infringement of freedom of the press and the Court concluded: "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government."

This applies equally to the property of religious organizations. Ownership of property is not a religious exercise except to devotees of a golden calf cult, which is not within

the purview of the Constitution. Those who listened to the Sermon on the Mount had no roof over them; there was no altar in the garden of Gethsemane; if the Israelites wandered forty years in the wilderness they did not enter a temple. John Wesley preached the Gospel in the fields. If "there are no atheists in foxholes" neither are there any religious edifices.

The Founder of Christianity declared "Wherever two or three are gathered in My name, there am I." Matt. 6:18, 20.

This Court held in *U. S.* v. *Seeger,* 380 U.S. 172: "The Congress considered that a person could be religious without being a member of any church."

Accordingly, the tax exemption complained of herein violates appellant's right of free exercise of religion. It is alleged in the complaint: "the aforesaid tax exemption constitutes an involuntary payment by plaintiff to the aforementioned religious organizations" and "plaintiff is a Christian and not a member of any religious organization as referred to herein, rejecting them as hostile." (Appendix p. 6.)

The First Amendment was made applicable to the states by the Fourteenth according to *Murdock* v. *Penna.,* 319 U.S. 113 (1943).

Appellant's adversaries have not cited a decision of this Court disputing appellant's contentions that the establishment and free exercise clauses, and the Fourteenth Amendment are violated by the tax exemptions of religious organizations.

Considering the optimistic claims of membership of religious organizations and the fact that a high percentage

of their enrollees are minors and housewives, it is apparent that a large majority of individual taxpayers across the land are not members of such organizations; each of them is "similarly situated" as the appellant.

Appellant's adversaries including the attorneys general of thirty-seven states, write reams concerning state constitutions, enactments and public policy and decisions of inferior courts. Again, *Murdock* holds that the Fourteenth Amendment made the First applicable to the States. They also advance the theory that if unconstitutionality can be prolonged sufficiently it becomes transformed into constitutionality. The fallacy of this argument has been demonstrated recently in the case of the housing laws. As Mr. Justice Brandeis once observed: "A constitutional question is not settled until it is settled right." There is also the factor that until recently taxpayers lacked "standing," *Flast* v. *Cohen,* 392 U.S. 83 (1968), due to the doctrine of separation of powers.

Then there is the chorus quoting the hackneyed declaration "the power to tax is the power to destroy" without quoting the qualification of Mr. Justice Holmes: "Not while this Court sits."

There is an attempt on the part of appellee's *amicus* United States Catholic Conference (pp. 13-14) to classify "religion"; it proclaims that there are two, namely worship and worship and charity. The federal Constitution makes no mention of any classification. It does not mention charity or education, which are public purposes; it mentions "religion," which is a private purpose, and the framers had abundant reason for placing it first in the Bill of Rights.

Religious organizations pay for the land they acquire and the construction thereon; they pay for the maintenance thereof in all respects as private property—except taxes, taxes which make government possible, which makes all their material things possible. Their pretensions to being charitable seem incompatible with their accumulated wealth, variously estimated at up to one hundred eighty billions, according to Liberty, Nov.-Dec. 1969 (inside cover). There is also the fact, that, including dependents, there must be nearly one million who derive their living directly from organized religion. While most probably live on a moderate scale, and some spartan-like, there are others who, like the rich man in the Bible, are "clad in purple and fine linen and fare sumptuously every day."

It is estimated that the annual tax avoidance by religious organizations approximates five point two billions.

The religious organizations' claims to moral teaching are largely mythical, taken all in all. Of course, individuals, whether laity or clergy or outside organizations, influence others by their exemplary conduct (as illustrated in appellant's Reply affidavit in the trial court, Appendix, pp. 22-23). A brief review of the history of American religious organizations in this regard is in order.

Beginning with the execution of Quakers by Puritans and the hanging and pressing of "witches" in Massachusetts (in obedience to Exodus) there followed the turmoil of the 19th century. The negro question was taken up by them in a manner which spread consuming hatred throughout the land, destroying Lincoln's practical solutions and precipitating the war. Writing of General Sherman's devastation of the South, Episcopal bishop Philips Brooks (composer of "O Little Town of Bethlehem") wrote "Isn't

Sherman a peach?" The greater part of the century witnessed nation-wide violence and vituperation visited upon Catholics by Protestants—not without grave provocation by Irish Catholic bishops who predicted publicly that they would gain dominion over the land (Carleton Beals, Brass Knuckle Crusade).

Early in this century the Episcopal Church opposed New York's tenement house laws because of its ownership of slums. Catholic clergy opposed New York's child labor law because it would interfere with the Old Testament notion of parental authority (in the New Testament there is a drastic warning to those "who would harm one of these littleones" and a mandate to "care for the widow and orphan"). Earlier, Baptists and Methodists combined to impose the Volstead Act on the nation, ushering in an area of unparalleled corruption.

Came World War I and they reached a new peak of hatemongering (Ray H. Abrams, "Preachers Present Arms"). Their repeat performance in World War II is still fresh in the minds of most adults.

Now they have many irons in the legislative fires to gain public money for their private purposes. Catholics and orthodox rabbis oppose humane abortion and birth control (Old Testament: "be fruitful and multiply"); they oppose humane slaughtering of meat animals (Exhibit A hereof); they oppose "mixed marriages" and some forbid burial in non-sectarian cemeteries. Mormons preach the Old Testament blessing of polygamy and God-accursedness of the Negro race. Ministers curry favor with minority interests by referring to Christians as "gentiles"; clergy teach the faulty translation "lead us not into temptation"—creating a cruel god in their own image. They seem to ignore the

Gospel of John and 1 Cor. 13. "Howbeit in vain do they worship Me, teaching for doctrines the commandments of men"; Mark 7:7.

There is a flight from this reality. Press accounts report more than five thousand "underground" churches in this land—groups who meet informally in homes and other private places for religious purposes in the manner of the first Christians. In France a whole class has sprung up called the "working clergy," priests who earn their living at the side of wage-earners and the movement is reported spreading in Turin. Here rent-paying storefront congregations dot the slums. On the Sunday morning following this Court's announcement of noting probable jurisdiction herein the radio spokesman for the Council of Churches of the City of New York said over Station WOR: "Tax exemption of churches has for some time been suspect, morally and theologically." And youth refuses to "put new wine into old bottles." The American Council of Churches, including several million Lutherans, Baptists, et al., and other religious bodies are not opposing this appeal. (See Exhibit B, hereof.)

In 1967, on the eve of the New York constitution referendum, all Catholic bishops, supported by the orthodox rabbinate, issued pastoral letters calling upon their followers to vote for the proposed new constitution which would open the way for public funds for parochial schools and yeshivas. The subservient politicians in convention assembled had approved the proposed new constitution by a two to one vote; the voters in the heavily Catholic-Jewish populated state defeated it by a vote of five to two.

CONCLUSION

The order of the New York Court of Appeals should be reversed.

Respectfully submitted,

FREDERICK WA[illegible]
Appellant pro se

New York City, November 11, 1969.

EXHIBIT A

NEW YORK DAILY NEWS, Tuesday, March 19, 1967

WRANGLE ON KOSHER SLAUGHTER

A conflict between Hebrew law and the concept of humane treatment of animals started a shouting match yesterday at a meeting called by Friends of the Animals Inc.

The session, at the Carnegie Endowment Building, 345 E. 46th St., was to be a discussion of the kosher method of slaughtering called "shackling and hoisting," in which a fully conscious animal is hung by one of his ankles while waiting to have his throat cut.

The discussion centered around two bills pending in the Legislature, both of which would change the methods of slaughtering animals, and which would prohibit shackling and hoisting of various animals.

Opponents of the bills claim any change in the kosher slaughtering laws would constitute an interference with a religious practice.

Part of the shouting erupted when author Fannie Hurst told the meeting "there is no longer any need for kosher killing." She said, "It no longer has profound meaning."

A noisy argument erupted between Bronx Assemblyman Seymour Posner, who opposes legislation against the kosher method of slaughtering, and William Gottlieb, a spokesman for the *American Council for Judaism, an anti-Zionist organization.*

Gottlieb, claiming *the hoisting and shackling "was never part of the historic religious practice,"* accused Posner of being uninformed.

Posner said he could not support either of the bills because he opposes any legislation interfering with religious

beliefs and ritual practices. He said those beliefs and practices should be determined by the practitioners of the affected religions.

By Sigismund Goren

Staff Correspondent of The News

Tel Aviv, March 19 (Special)—Some "problem" couples, unable to marry here because of age-old taboos strictly enforced by the Israeli rabbinate, have found a short cut to matrimony: marriage by letter—from Mexico.

The proxy marriages are seen as one solution for Israelis who are in a bind because of the rabbinate's exclusive jurisdiction in matters of personal status, and the lack of civil marriage in Israel.

"Helps Break Monopoly"

Here nationality is identified with religion, and the child of a Christian mother has no legal standing unless the mother converts to Judaism and remarries her husband.

Intermarriage is usually impossible here between Jews and gentiles, Jews and Karaites (a Jewish sect which was excommunicated about 10 centuries ago for rejecting rabbinical law), or Jews and Samaritans (another Jewish sect considered heretical).

EXHIBIT B

CAMDEN, N.J. EVENING BULLETIN, October 22, 1969

PRESBYTERIANS TO STUDY TAX EQUIVALENTS

Ocean City—(AP)—The United Presbyterian Synod of New Jersey has accepted a recommendation to find ways that its churches may contribute the equivalent of taxes to communities.

The recommendation in a report by a special committee on tax exemption of church property was made at the 147th annual meeting of the synod here yesterday.

It proposed that the tax-exempt churches "do their fair share in defraying public neighborhood expenditures."

Local Discussion

The nearly 800 delegates at the meeting, representing about 400 churches, agreed that the state's seven Presbyteries should discuss locally ways of contributing to the municipalities in which the churches are located.

The synod recommended that committees be set up to determine the fair value of public service received by church property and recommend ways in which the communities could be reimbursed.

The United Presbyterian Church has a membership of about 207,000 in the state. The congregation's national membership is 3,258,751 with 8,887 individual congregations.

Legislative Commission

A state legislative commission currently is studying whether state law should be revised to require taxation of churches and other tax-exempt organizations. The commission, created a year ago, hopes to report to the legislature early in 1970.

FILED

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IN THE

Supreme Court of the United States

October Term, 1969

No. 126

FRANCHISE WALL, *Appellant*,

v.

TAX COMMISSION OF THE CITY OF NEW YORK, *Appellee*.

On Appeal From the Court of Appeals of the State of New York

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS AS AMICUS CURIAE

NATHAN LEWIN
MILLER, CASSIDY, LARROCA & LEWIN
1701 K Street, N. W.
Washington, D. C. 20006
Attorneys for National Jewish Commission on Law and Public Affairs

119 Nassau Street
New York, New York 10038

JOSEPH BERGAN
Of Counsel

[illegible] SONNE
Special Consultant

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 135

FREDERICK WALZ, *Appellant*,

v.

TAX COMMISSION OF THE CITY OF NEW YORK, *Appellee*.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

---

1. The National Jewish Commission on Law and Public Affairs, a voluntary association organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish Community in matters of public concern, hereby applies for itself and on behalf of the following Na-

tional Orthodox Jewish organizations, for leave to submit the attached brief:

Agudath Harabonim,
Union of Orthodox Rabbis
Agudath Israel of America
National Council of Young Israel
Poalei Agudath Israel of America
Rabbinical Alliance of America
Rabbinical Council of America
Religious Zionists of America
Torah Umesorah, National Society of Hebrew Day Schools
Union of Orthodox Jewish Congregations of America

2. Pursuant to Rule 42(3) of the Revised Rules of this Court, consent to the filing of this *amicus* brief was requested of the parties on September 16, 1969. In a letter dated September 17, appellee (per Hon. J. Lee Rankin, Corporation Counsel) consented to the filing of the brief. No response has been received from appellant.

3. Neither of the parties in this case have the direct and immediate interest in the resolution of the issue presented that is possessed by these *amici*. The organizations enumerated above on whose behalf the National Jewish Commission on Law and Public Affairs is submitting this brief represent religious corporations and associations which own property in the State of New York and elsewhere, and which will be seriously and irreparably injured if appellant's contention is sustained. It is the view of these *amici* that a denial of tax exemption to such associations on account of their religious character would be unconstitutionally discriminatory and would violate the

constitutional protection granted by the First Amendment to the exercise of religion.

4. The constitutional position urged in the attached *amicus* brief—*i.e.*, that the tax exemption for property owned by religious corporations and associations is *constitutionally mandatory*—is one which neither party before this Court can be expected to take. The attached brief sets out that position which, in the view of these *amici*, is essential to the survival of religious freedom in this country.

CONCLUSION

For the foregoing reasons, the motion for leave to file the attached brief *amicus curiae* should be granted.

Respectfully submitted,

NATHAN LEWIN
MILLER, CASSIDY, LARROCA
& LEWIN
1701 K Street, N.W.
Washington, D. C. 20006

Attorney for
National Jewish Commission
on Law and Public Affairs
119 Nassau Street
New York, New York 10038

JULIUS BERMAN
Of Counsel

DR. MARVIN SCHICK
Special Consultant

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OCTOBER TERM, 1969

No. 135

FREDERICK WALZ, *Appellant*,

v.

TAX COMMISSION OF THE CITY OF NEW YORK, *Appellee*.

BRIEF OF NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS AS AMICUS CURIAE

This brief is submitted on behalf of the National Jewish Commission on Law and Public Affairs and is joined in by the following organizations:

Agudath Harabonim,
Union of Orthodox Rabbis
Agudath Israel of America
National Council of Young Israel
Poalei Agudath Israel of America
Rabbinical Alliance of America
Rabbinical Council of America
Religious Zionists of America
Torah Umesorah, National Society of
Hebrew Day Schools
Union of Orthodox Jewish
Congregations of America

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INTEREST OF THE AMICUS CURIAE

The National Jewish Commission on Law and Public Affairs is a voluntary association organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern. The Commission is deeply committed to the preservation of constitutional rights of all Americans, and in particular to the principles of the First Amendment, in the belief that thereby Americans of the Jewish faith, in common with all Americans, will enjoy the blessings of liberty. The Commission firmly believes that the survival of religious institutions in the United States depends upon their being treated fairly and equally at the hands of the government. We are of the view that the Free Exercise Clause of the First Amendment was designed by the Nation's Founding Fathers to protect religion and religious institutions against invidious and unfair discrimination. Accordingly, we submit this brief to point out that the constitutional contention made by appellant would, if sustained, result in impermissible discriminations and would undermine the important freedoms secured for all citizens by the First Amendment.

QUESTION PRESENTED

Whether the Establishment Clause of the First Amendment requires the State of New York, which grants tax exemption to educational and charitable institutions, to deny such exemption to religious institutions solely because of their religious character.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution of the State of New York classifies real and personal property owned by nonprofit religious associations and organizations together with similar property owned by nonprofit educational or charitable associations and organizations, and it exempts from taxation all such property. The Real Property Tax Law of the State of New York defines "nonprofit organizations" which are exempted from real property tax so as to include such property if owned by "a corporation or association organized exclusively" for religious purposes. In so doing, it classifies such religious organizations together with corporations or associations "organized exclusively" for "moral or mental improvement of men and women" and for "charitable, benevolent, . . . educational . . . scientific, literary, . . . patriotic, historical or cemetery purposes." The constitutional issue presented by this appeal is whether this classification violates the First and Fourteenth Amendments because it results in the exemption from tax of property held for religious purposes and thereby operates as a governmentally authorized financial benefit to religious institutions.

These *amici* submit that the challenged provisions are not merely permitted by the cited Amendments to the United States Constitution, but are, in fact, mandated by them. The nub of our contention is that religious corporations and associations are constitutionally entitled, by virtue of the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth, to no less—both in the allocation of governmental burdens and in the distribution

of benefits—than other "educational or charitable" enterprises. This Court's decisions have established time and again that the Religion Clauses of the First Amendment were designed to give free exercise of religion a "preferred" place in the panoply of rights possessed by inhabitants of the United States. Rather than requiring, therefore, that New York—or any other State of the Union—single out religious activities as the only nonprofit eleemosynary efforts subject to the financial burden of a tax, the Constitution demands that they be treated by State law on at least an equal footing with other charitable enterprises.

We point out that New York has drawn no distinctions under its Constitution and statutes among various types of charitable activities. There is, therefore, no question here of peculiar or unusual advantages being given to religious organizations in contrast with charities which are not religious in nature. The only question is whether New York may classify property owned for nonprofit religious purposes with that of other charitable organizations or whether the Constitution commands that it be classified "with the wares and merchandise of hucksters and peddlers." *Murdock* v. *Pennsylvania,* 319 U.S. 105, 115 (1943). We submit that the decisions of this Court and the firmly rooted policies underlying the First Amendment entitle the religious organizations which come within these provisions of New York law to tax exemption as a matter of constitutional right.

HAVING DETERMINED TO EXEMPT PROPERTY OWNED BY CHARITABLE INSTITUTIONS FROM TAXATION, NEW YORK IS CONSTITUTIONALLY OBLIGED TO AFFORD THE SAME PRIVILEGES TO RELIGIOUS AS TO NON-RELIGIOUS ORGANIZATIONS

A. New York's Constitutional and Statutory Taxing Scheme Creates Exempt and Non-Exempt Classifications, and the Property of Charitable Organizations Is Covered by the Latter

New York's Real Property Tax Law (McKinney's Consolidated Laws, Vol. 49A) authorizes taxation of "[a]ll real property within the state" (*id.* at § 300) under the supervision of a state board of equalization and assessment (*id.* at § 202) and a division of equalization and assessment in the State's executive department (*id.* at § 201). The law provides, however, for the exemption from this tax (as well as exemption from special *ad valorem* levies and special assessments, see *id.* at § 490) of a broad range of realty publicly (*id.* at §§ 400-418) and privately (*id.* at §§ 420-489) owned. The "private property" thus exempted includes that owned by certain corporations organized for profit, including opera house corporations (§ 426), corporations operating infant homes (§ 400), agricultural societies (§ 450), and medical, pharmaceutical and dental societies (§§ 470, 472, 474). The first of the sections included in the exempt "private property" group is at issue here, and it is designed to cover "non-profit organizations" (*id.* at § 420).

The statute, as amended in 1965, exempts property:

> "owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library,

> patriotic, historical or cemetery purposes, for the enforcement of laws relating to children or animals, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association as hereinafter provided . . . ."

The statute carefully requires that the organization or association be nonprofit in nature:

> "Such real property shall not be exempt if any officer, member or employee of the owning corporation or association shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services as effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purposes be a guise or pretense for directly or indirectly making any other pecuniary profit for such a corporation or association or for any of its members or employees; or if it be not in good faith organized or conducted exclusively for one or more such purposes."

Appellant's constitutional claim is, essentially, that the First and Fourteenth Amendments require that religious organizations be denied the benefit of this broad tax relief, notwithstanding the fact that it is granted across-the-board to nonprofit charitable corporations and organizations. The result, if appellant's claims were sustained, would be the taxation of such property on a par with commercially held real property and that held by private individuals for personal profit or for other personal motives.

We emphasize, at this point, what the New York Constitution and statute do *not* do. They do not grant a unique or peculiar tax status to religious corpora-

tions vis-a-vis other charities which are not religious in nature. Compare Section 511(a), Internal Revenue Code of 1954. Nor do they even distinguish in degree —either by differing tax rates or by the special augmentation of generally available tax benefits—between religious and nonreligious charities. Compare Section 170(b)(1)(A), Internal Revenue Code of 1954. They simply assign property owned by religious organizations precisely the same tax status as that enjoyed by secular nonprofit "charitable and educational" institutions. We demonstrate below that the United States Constitution does not permit New York to do any less.

B. A Denial of Tax Exemption on Account of the Religious Nature of the Claimant Organization Would Violate the First and Fourteenth Amendments

We begin with the well-established premise that the First Amendment prohibits not merely a direct governmental restraint upon the exercise of the rights secured by it, but also the indirect deterrent of a tax (*Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), or of a withdrawal or denial of tax exemption (*Speiser* v. *Randall*, 357 U.S. 513 (1958)). This Court applied that principle to protect the free exercise of religion when it held that a State could not condition unemployment compensation benefits in a manner which would burden the recipient's practice of his or her religion. *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

A denial of tax exemption to religious organizations in a statutory framework such as New York's would, under the above decisions, have the same constitutional consequence as a tax directed specifically and particularly at property owned by religious organizations. For apart from its religious character, the nature of a

nonprofit corporation or organization operating a synagogue, church or religious school is no different from the other nonprofit associations enumerated in Section 420 of New York's Real Property Tax Law. If tax exemptions were denied to synagogue and church property while being retained for buildings operated for "scientific, literary, bar association, library, patriotic, [and] historical" purposes or for nonreligious "charitable" and "benevolent" purposes (including those devoted to "moral or mental improvement of men and women") it would only be *because* of the religious nature of the owning organization and the religious purpose for which the building is to be used.

Such a singling out of religious activity and property necessary for the exercise of religion would, we submit, be impermissibly discriminatory under the First and Fourteenth Amendments. In *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943), and *Follett* v. *McCormick,* 321 U.S. 573 (1944), this Court struck down, as violative of the Free Exercise Clause of the First Amendment, local ordinances which required that license taxes be paid by, *inter alia,* traveling evangelists and preachers. The Court held that "a flat license tax as applied to one who earns his livelihood as an evangelist or preacher" is unconstitutional because "[t]he exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious . . . as the imposition of a censorship or prior restraint." 321 U.S. at 576, 577. The Court rejected the argument that the licensing ordinance was, on its face, nondiscriminatory because it applied to all commercial activity (319 U.S. at 115):

> "A license tax certainly does not acquire constitutional validity because it classifies the privileges

> protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."

Even the dissenters in *Murdock* and its companion cases—who were concerned lest the majority opinion be read as totally exempting church or press from the financial burdens of government (319 U.S. at 127-128) —agreed that if the ordinances had been discriminatory—*i.e.*, if they had singled out one religious group for the payment of taxes, or, for that matter, all religious or "informatory" groups—"entirely distinct issues" would have been raised (319 U.S. at 118). Discrimination of that nature would clearly have come within the rule of *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), where the Court struck down a State license tax directed solely at newspapers, magazines, periodicals and other publications on the ground that a statute so "single in kind" (297 U.S. at 250) would impermissibly fetter the free press guaranteed by the First Amendment.

The same result would follow if the Constitution were read, as appellant would have it, to require States and local jurisdictions to treat religious nonprofit associations—which are otherwise, by their nature, benevolent and charitable and designed to promote the "moral or mental improvement of men and women" —differently from their nonreligious counterparts. The consequence would be a tax on religion, different in neither kind nor constitutional impact from the tax on newspapers struck down in *Grosjean* or from a hypothetical "single in kind" tax on religious colpor-

teurs—which this Court would, it appears, have unanimously found unconstitutional had it been presented in any of the cases decided together with *Murdock*.

Indeed, if the New York Constitution and statute excluded religious organizations *because of their religious nature* from the benefits of the otherwise available tax exemption, that exclusion would, we submit, present serious questions under the Equal Protection Clause of the Fourteenth Amendment. For, entirely apart from the protections of the First Amendment, legislative discriminations on the basis of creed are no less invidious and impermissible than those based on race or color. *E.g., United States* v. *Seeger,* 380 U.S. 163, 188 (1965) (Douglas, J., concurring). And to grant a property-tax exemption to a secular organization which promotes the "moral improvement" of man while denying it to a theistic group would be to make precisely the discrimination prohibited by the Equal Protection Clause.

C. The "Establishment Clause" Neither Requires Nor Saves a State Statute Which Imposes a Unique Burden on Religious Organizations.

The discrimination against religious institutions which appellant is seeking in this case cannot, for the reasons given above, pass constitutional muster—unless, of course, the prohibition against establishment of religion also prescribed by the First Amendment requires or permits it. It does neither.

Here, as was true of the "extension of unemployment benefits to Sabbatarians in common with Sunday worshippers" in *Sherbert* v. *Verner,* 374 U.S. 398, 409 (1963), the granting of tax-exempt status to religious corporations in common with nonreligious charities

"reflects nothing more than the governmental obligation of neutrality in the face of religious differences." All that the State of New York has done is so to cast its constitution and statutes that "individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians or the members of any other faith" are not disadvantaged "*because of their faith, or lack of it.*" *Everson* v. *Board of Education,* 330 U.S. 1, 16 (1947).

This case does not involve any special or unique benefit granted to religious organizations. Nor does it reflect any decision by the State to promote all religions, as contrasted with nonreligious endeavors. Under the New York statute all charities are treated alike, irrespective of religious affiliation. Unless the Establishment Clause is a directive that the practice of religion be destroyed by the imposition of unique burdens not placed on similar nonreligious activities, that constitutional provision cannot be read as sustaining appellant's position.

CONCLUSION

At issue here is the constitutionality of a tax exemption granted to religious nonprofit organizations in common with other charities. New York's authority to withhold that exemption is governed by the principle that "[i]f Government wishes to withdraw a subsidy or a privilege, it must do so by means and in terms which do not endanger First Amendment rights." *Lamont* v. *Postmaster General,* 381 U.S. 301, 310 (1965) (concurring opinion). We submit that First Amendment rights would be endangered and indeed, violated, if this tax exemption did not extend to property owned by religious associations. It follows,

a fortiori, that the decision below, sustaining the statute against constitutional challenge, should be affirmed.

Respectfully submitted,

NATHAN LEWIN
MILLER, CASSIDY, LARROCA
& LEWIN
1701 K Street, N.W.
Washington, D. C. 20006

Attorney for
National Jewish Commission
on Law and Public Affairs
119 Nassau Street
New York, New York 10038

JULIUS BERMAN
Of Counsel

DR. MARVIN SCHICK
Special Consultant

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 135.—October Term, 1969

Frederick Walz, Appellant, *v.* Tax Commission of the City of New York. | On Appeal from the Court of Appeals of the State of New York.

[May 4, 1970]

Mr. Chief Justice Burger delivered the opinion of the Court.

Appellant, owner of real estate in Richmond County, New York, sought an injunction in the New York courts to prevent the New York City Tax Commission from granting property tax exemptions to religious organizations for religious properties used solely for religious worship. The exemption from state taxes is authorized by Art. 16, § 1, of the New York Constitution, which provides:

> "Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit." [1]

[1] Art. 16, § 1, of the New York State Constitution is implemented by § 420, subd. 1, of the New York Real Property Tax Law which states in pertinent part:

"Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary,

The essence of appellant's contention was that the New York State Tax Commission's grant of an exemption to church property indirectly requires the appellant to make a contribution to religious bodies and thereby violates provisions prohibiting establishment of religion under the First Amendment which under the Fourteenth Amendment is binding on the States.[2]

Appellee's motion for summary judgment was granted and the Appellate Division, New York Supreme Court, and the New York Court of Appeals affirmed. We noted jurisdiction, 395 U. S. 957 (1969), and affirm.

I

Prior opinions of this Court have discussed the development and historical background of the First Amendment in detail. See *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *Engel* v. *Vitale*, 370 U. S. 421 (1962). It would therefore serve no useful purpose to review in detail the background of the Establishment and Free Exercise Clauses of the First Amendment or to restate what the Court's opinions have reflected over the years.

It is sufficient to note that for the men who wrote the Religious Clauses of the First Amendment the "establishment" of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity. In England, and in some Colonies at the time of the separation in 1776, the Church of England was sponsored and supported by the Crown as a state, or established, church; in other countries "establishment"

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hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section."

[2] The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

meant sponsorship by the sovereign of the Lutheran or Catholic Church. See *Engel* v. *Vitale,* 370 U. S., at 428 n. 10. See generally C. Antieau, A. Downey, & E. Roberts, Freedom from Federal Establishment (1964). The exclusivity of established churches in the 17th and 18th centuries, of course, was often carried to prohibition of other forms of worship. See *Everson* v. *Board of Education,* 330 U. S., at 9–11; L. Pfeffer, Church, State and Freedom 71 *et seq.* (1967).

The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religious Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. For example, in *Zorach* v. *Clauson,* 343 U. S. 306 (1952), MR. JUSTICE DOUGLAS, writing for the Court, noted:

> "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State." *Id.,* at 312.
>
> "We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Id.,* at 313.

MR. JUSTICE HARLAN expressed something of this in his dissent in *Sherbert* v. *Verner*, 374 U. S. 398 (1963), saying that the constitutional neutrality imposed on us

> "is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation." *Id.*, at 422.

The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.

Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs *amici*, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion

Clauses is an involvement of sorts—one which seeks to mark boundaries to avoid excessive entanglement.

The hazards of placing too much weight on a few words or phrases of the Court is abundantly illustrated within the pages of the Court's opinion in *Everson*. MR. JUSTICE BLACK, writing for the Court's majority, having said the First Amendment

> "means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another." 330 U. S., at 15,

yet had no difficulty in holding that

> "Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. *It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets . . . .*" *Id.*, at 17. (Emphasis added.)

The Court did not regard such "aid" to schools teaching a particular religious faith as any more a violation of the Establishment Clause than providing "state-paid policemen, detailed to protect children . . . [at the schools] from the very real hazards of traffic . . . ." *Ibid.*

Mr. Justice Jackson, in perplexed dissent in *Everson*, noted that

> "the undertones of the opinion, advocating complete and uncompromising separation . . . seem utterly discordant with its conclusion . . . ." *Id.*, at 19.

Perhaps so. One can sympathize with Mr. Justice Jackson's logical analysis but agree with the Court's eminently sensible and realistic application of the language of the Establishment Clause. In *Everson* the Court declined to construe the religion clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history. Surely, bus transportation and police protection to pupils who receive religious instruction "aid" that particular religion to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age. No religious body that maintains schools would deny this as an affirmative if not dominant policy of church schools. But if as in *Everson* buses can be provided to carry and policemen to protect church school pupils, we fail to see how a broader range of police and fire protection given equally to all churches, along with nonprofit hospitals, art galleries, and libraries receiving the same tax exemption, is different for purposes of the religion clauses.

Similarly, making textbooks available to pupils in parochial schools in common with public schools was surely an "aid" to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books. Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment. *Board of Education* v. *Allen*, 392 U. S. 236 (1968). In so doing the Court was heeding both its own prior holdings and our religious tradition. MR. JUSTICE DOUGLAS, in *Zorach* v. *Clauson*, *supra*, after recalling that we "are a religious people whose institutions presuppose a Supreme Being," went on to say:

> "We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. . . . *When the state encourages religious*

> *instruction . . . it follows the best of our traditions.* For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. 343 U. S., at 313–314. (Emphasis added.)

With all the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a "tight rope" and one we have successfully traversed.

II

The legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its "moral or mental improvement," should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes. It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest. Qualification for tax exemption is not perpetual or immutable; some tax-exempt groups lose that status when their activities take them outside the classification and new entities can come into being and qualify for exemption.

Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms—economic, political, and sometimes harshly oppressive. Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers. The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself. See *Sherbert* v. *Verner*, 374 U. S. 398, 423 (1963) (HARLAN, J., dissenting); *Braunfeld* v. *Brown*, 366 U. S. 599, 608 (1961). See generally Kauper, The Constitutionality of Tax Exemptions for Religious Activities in The Wall Between Church and State 95 (D. Oaks ed. 1963). We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions.

We find it unnecessary to justify the tax exemption on the social welfare services or "good works" that some churches perform for parishioners and others—family counselling, aid to the elderly and the infirm, and to children. Churches vary substantially in the scope of such services; programs expand or contract according to resources and need. As public-sponsored programs enlarge, private aid from the church sector may diminish. The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs,

thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.

Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. The hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation. We cannot ignore

the instances in history when church support of government led to the kind of involvement we seek to avoid.[3]

The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion. As Mr. Justice Holmes commented in a related context "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921). The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.

Separation in this context cannot mean absence of all contact; the complexities of modern life inevitably produce some contact and the fire and police protection received by houses of religious worship are no more than incidental benefits accorded all persons or institutions within a State's boundaries, along with many other exempt organizations. The appellant has not estab-

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[3] The support of religion with direct allocation of public revenue was a common colonial practice. See C. Antieau, A. Downey, & E. Roberts, Freedom from Federal Establishment cc. 1 and 2 (1964). A general assessment proposed in the Virginia Legislature in 1784 prompted the writing of James Madison's Remonstrance. See opinion of MR. JUSTICE DOUGLAS dissenting, *post*, at —. Governmental support of religion is common in many countries. See *e. g.*, R. Murray, A Brief History of the Church of Sweden 75 (1961); G. Codding, The Federal Government of Switzerland 53–54 (1961); M. Seerkic, Zbirka Propisa, Doprinosima: Porezima Gradjana 357 (Yugoslavia) (1968).

lished even an arguable quantitative correlation between the payment of an ad valorem property tax and the receipt of these municipal benefits.

All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax.[4] Such treatment is an "aid" to churches no more and no less in principle than the real estate tax exemption granted by States. Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.

It is significant that Congress, from its earliest days, has viewed the religion clauses of the Constitution as authorizing statutory real estate tax exemption to religious bodies. In 1802 the 7th Congress enacted a taxing statute for the County of Alexandria, adopting the 1800 Virginia statutory pattern which provided tax exemptions for churches. 2 Stat. 194.[5] As early as 1813

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[4] Act of August 27, 1894, § 32, 28 Stat. 556. Following passage of the Sixteenth Amendment, federal income tax acts have consistently exempted corporations and associations, organized and operated exclusively for religious purposes along with eleemosynary groups, from payment of the tax. Act of Oct. 3, 1913, § IIG (a), 38 Stat. 172. See Int. Rev. Code of 1954, § 501 *et seq.*, 26 U. S. C. § 501 *et seq.*

[5] In 1798 Congress passed an Act to provide for the valuation of lands and dwelling houses. All existing state exemptions were expressly excluded from the aforesaid valuation and enumeration. Act of July 9, 1798, § 8, 1 Stat. 585. Subsequent levies of direct taxes expressly or impliedly incorporated existing state exemptions.

the 12th Congress refunded import duties paid by religious societies on the importation of religious articles.[6] During this period the City Council of Washington, D. C., acting under congressional authority, Act of Incorporation, § 7, 2 Stat. 197 (May 3, 1802), enacted a series of real and personal property assessments which uniformly exempted church property.[7] In 1870 the Congress specifically exempted all churches in the District of Columbia and appurtenant grounds and property "from any and all taxes or assessments, national, municipal, or county." Act of June 17, 1870, 16 Stat. 153.[8]

It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the exemption to churches,

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Act of July 14, 1798, § 2, 1 Stat. 598 (express incorporation of state exemption). See Act of Aug. 2, 1813, § 4, 3 Stat. 71; Act of Jan. 9, 1815, § 5, 3 Stat. 166 (express incorporation of state exemptions).

[6] See 6 Stat. 116 (1813), relating to plates for printing Bibles. See also 6 Stat. 346 (1826) relating to church vestments, furniture, and paintings; 6 Stat. 162 (1816), bible plates; 6 Stat. 600 (1834), and 6 Stat. 675 (1836), church bells.

[7] See, *e. g.*, Acts of the Corporation of the City of Washington, First Council, c. V, approved Oct. 6, 1802, p. 13; Acts of the Corporation of the City of Washington, Second Council, § 1, approved Sept. 12, 1803, p. 13; Acts of the Corporation of the City of Washington, Third Council, § 1, approved Sept. 5, 1804, p. 13. Succeeding Acts of the Corporation impliedly renewed the exemption in subsequent assessments. See, *e. g.*, Act of the Corporation of the City of Washington, Thirteenth Council, c. 19, § 2, approved July 27, 1815, p. 24.

[8] Subsequent Acts of Congress carried over the substance of the exemption. Act of July 12, 1876, § 8, 19 Stat. 85; Act of March 3, 1877, § 8, 19 Stat. 399; Act of August 15, 1916, 39 Stat. 514; D. C. Code Ann. § 47–801a (1967).

openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside. Nearly 50 years ago Mr. Justice Holmes stated:

> "[I]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman* v. *Rosenbaum*, 260 U. S. 22, 31 (1922).

Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious beliefs. Thus, it is hardly useful to suggest that tax exemption is but the "foot in the door" or the "nose of the camel in the tent" leading to an established church. If tax exemption can be seen as this first step toward "establishment" of religion, as MR. JUSTICE DOUGLAS fears, the second step has been long in coming. Any move which realistically "establishes" a church or tends to do so can be dealt with "while this Court sits."

Mr. Justice Cardozo commented in The Nature of the Judicial Process (1921) on the "tendency of a principle to expand itself to the limit of its logic"; such expansion must always be contained by the historical frame of reference of the principle's purpose and there is no lack of vigilance on this score by those who fear religious entanglement in government.

The argument that making "fine distinctions" between what is and what is not absolute under the Constitution is to render us a government of men, not laws, gives too little weight to the fact that it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution.

We must frequently decide, for example, what are "reasonable" searches and seizures under the Fourth Amendment. Determining what acts of government tend to establish or interfere with religion falls well within what courts have long been called upon to do in sensitive areas.

It is interesting to note that while the precise question we now decide has not been directly before the Court previously, the broad question was discussed by the Court in relation to real estate taxes assessed nearly a century ago on land owned by and adjacent to a church in Washington, D. C.[9] At that time Congress granted real estate tax exemptions to buildings devoted to art, to institutions of public charity, libraries, cemeteries, and "church buildings, and grounds actually occupied by such buildings." In denying tax exemption as to land owned by but not used for the church, but rather to produce income, the Court concluded:

> "In the exercise of this [taxing] power, Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property." *Gibbons* v. *District of Columbia,* 116 U. S. 404, 408 (1886).

It appears that at least up to 1885 this Court, reflecting more than a century of our history and uninterrupted practice, accepted without discussion the proposition that federal or state grants of tax exemption to churches were not a violation of the Religious Clauses of the First Amendment. As to the New York statute, we now confirm that view.

Affirmed.

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[9] *Gibbons* v. *District of Columbia,* 116 U. S. 404 (1886). Cf. *Washington Ethical Society* v. *District of Columbia,* 101 U. S. App. D. C. 371, 249 F. 2d 127 (1957).

SUPREME COURT OF THE UNITED STATES

No. 135.—October Term, 1969

Frederick Walz, Appellant, v. Tax Commission of the City of New York.	On Appeal from the Court of Appeals of the State of New York.

[May 4, 1970]

Mr. Justice Brennan, concurring.

I concur for reasons expressed in my opinion in *Abington Township* v. *Schempp*, 374 U. S. 203, 230 (1963). I adhere to the view there stated that to give concrete meaning to the Establishment Clause,

> "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment. What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such manner, there inhere in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government. On the other hand, there may be myriad forms of in-

volvements of government with religion which do not import such dangers and therefore should not, in my judgment, be deemed to violate the Establishment Clause." *Id.*, at 294–295.

Thus, in my view, the history, purpose, and operation of real property tax exemptions for religious organizations must be examined to determine whether the Establishment Clause is breached by such exemptions. See *id.*, at 293.

I

The existence from the beginning of the Nation's life of a practice, such as tax exemptions for religious organizations, is not conclusive of its constitutionality. But such practice is a fact of considerable import in the interpretation of abstract constitutional language. On its face, the Establishment Clause is reasonably susceptible of different interpretations regarding the exemptions. This Court's interpretation of the clause, accordingly, is appropriately influenced by the reading it has received in the practices of the Nation. As Mr. Justice Holmes observed in an analogous context, in resolving such questions of interpretation "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921). The more longstanding and widely accepted a practice, the greater its impact upon constitutional interpretation. History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation. Rarely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming.

The Establishment Clause, along with the other provisions of the Bill of Rights, was ratified by the States in 1791. Religious tax exemptions were not an issue in the petitions calling for the Bill of Rights, in the perti-

nent congressional debates, or in the debates preceding ratification by the States.[1] The absence of concern about the exemptions could not have resulted from failure to foresee the possibility of their existence, for they were widespread during colonial days.[2] Rather, it seems clear that the exemptions were not among the evils which the Framers and Ratifiers of the Establishment Clause sought to avoid. Significantly, within a decade after ratification, at least four States passed statutes exempting the property of religious organizations from taxation.[3]

Although the First Amendment may not have applied to the States during this period, practice in Virginia at the time is nonetheless instructive. The Commonwealth's efforts to separate church and state provided the direct antecedents of the First Amendment, see *McGowan* v. *Maryland*, 366 U. S. 420, 437–440 (1961); *Abington Township* v. *Schempp*, *supra*, at 233–234 (BRENNAN, J., concurring); *Everson* v. *Board of Education*, 330 U. S. 1, 33–38 (1947) (Rutledge, J., dissenting), and Virginia remained unusually sensitive to the proper relation between church and state during the years im-

[1] In fact, it does not appear that the exemptions were even discussed. See, *e. g.*, Antieau, Carroll & Burke, Religion Under the State Constitutions 122 (1965): "As far as anyone has been able to discover, the topic was never mentioned in the debates which took place prior to the adoption of the First Amendment."

[2] See, *e. g.*, Antieau, Downey & Roberts, Freedom from Federal Establishment 20–21, 73–74, 175 (1964); cf. 3 Stokes, Church and State in the United States 419 (1950).

[3] 2 Del. Laws of 1777–1797, at 1247 (act of Feb. 9, 1796); 2 Md. Laws of 1785–1799, Kilty, at c. 89 (act of Jan. 20, 1798); N. Y. Laws of 1797–1800, c. 72, at 414 (act of April 1, 1799); 2 Va. Statutes at Large of 1796–1802, Shepherd's Continuation of Hening, at 200 (act of Jan. 23, 1800). See also 16 Penn. Statutes at Large of 1798–1801, at 379 (act of April 11, 1799). For practice in other States, see the accounts in Antieau, Carroll & Burke, *supra*, n. 1, at 123–169; Antieau, Downey & Roberts, *supra*, n. 2, at 73–74; Zollmann, American Civil Church Law 238–242 (1917).

mediately following ratification of the Establishment Clause. Virginia's protracted movement to disestablish the Episcopal Church culminated in the passage on January 24, 1799, of "An ACT to repeal certain acts, and to declare the construction of the [Virginia] bill of rights and constitution, concerning religion." The 1799 Act stated that the Virginia Bill of Rights had "excepted from the powers given to the [civil] government the power of reviving any species of ecclesiastical or church government . . . by referring the subject of religion to conscience" and that the repealed measures had "bestowed property upon [the Anglican] church," had "asserted a legislative right to establish any religious sect" and had "incorporated religious sects, all of which is inconsistent with the principles of the constitution, and of religious freedom, and manifestly tends to the re-establishment of a national church." 2 Va. Statutes at Large of 1796–1802, Shepherd's Continuation of Hening, at 149. Yet just one year after the passage of this Act, Virginia reenacted a measure exempting from taxation property belonging to "any . . . college, houses for divine worship, or seminary of learning." *Id.*, at 200. This exemption dated at least from 1777 and had been reaffirmed immediately before and after ratification of the First Amendment. See 9 Va. Statutes at Large of 1775–1778, Hening, at 351; 13 Va. Statutes at Large of 1789–1792, Hening, at 112, 241, 336–337. It may reasonably be inferred that the Virginians did not view the exemption for "houses of divine worship" as an establishment of religion.

Similarly, in 1784 the New York Legislature repealed colonial acts establishing the Episcopal Church in several counties of the State. See N. Y. Laws of 1777–1784, c. 38. Yet in 1799, the legislature provided that "no house or land belonging to . . . any church or place of public worship, . . . nor any college or incorporated

academy, nor any school house, . . . alms house or property belonging to any incorporated library, shall be taxed by virtue of this act." N. Y. Laws of 1797–1800, c. 72. And early practice in the District of Columbia—governed from the outset by the First Amendment—mirrored that in the States. In 1802 the Corporation of the City of Washington, under authority delegated by Congress, exempted "houses for public worship" from real property taxes. Rothwell's Laws of the Corporation of the City of Washington 20 (1833). See also the congressional acts cited in the Court's opinion, *ante*, at —.

Thomas Jefferson was President when tax exemption was first given Washington churches, and James Madison sat in sessions of the Virginia General Assembly which voted exemptions for churches in that Commonwealth.[4] I have found no record of their personal views on the respective acts.[5] The absence of such a record is itself

[4] See, *e. g.*, Swem & Williams, A Register of the General Assembly of Virginia, 1776–1918, at 53 (1918); Journal of the House of Delegates of the Commonwealth of Virginia, at 94, 98 (1799–1800).

[5] In an essay written after he had left the presidency, Madison did argue against tax exemptions for churches, the incorporation of ecclesiastical bodies with the power of acquiring and holding property in perpetuity, the right of the houses of Congress to choose chaplains who are paid out of public funds, the provision of chaplains in the army and navy, and presidential proclamations of days of thanksgiving or prayer—though he admitted proclaiming several such days at congressional request. See Fleet, Detached [*sic*] Memoranda, 3 William & Mary Quarterly 534, 555–562 (1946). These arguments were advanced long after the passage of the Virginia exemption discussed in the text, *supra*, and even longer after the adoption of the Establishment Clause. They represent at most an extreme view of church-state relations, which Madison himself may have reached only late in life. He certainly expressed no such understanding of Establishment during the debates on the First Amendment. See 1 Annals of Congress 434, 730–731, 755. And even if he privately held these views at that time, there is no evidence that they were shared by others among the Framers and Ratifiers of the Bill of Rights.

significant. It is unlikely that two men so concerned with the separation of church and state would have remained silent had they thought the exemptions established religion. And if they had not either approved the exemptions, or been mild in their opposition, it is probable that their views would be known to us today. Both Jefferson and Madison wrote prolifically about issues they felt important, and their opinions were well known to contemporary chroniclers. See, for example, the record preserved of Madison's battle in 1784–1785 against the proposal in the Virginia Assembly to levy a general tax to support "teachers of the Christian religion," *infra*, in the dissenting opinion of MR. JUSTICE DOUGLAS, at ——. Much the same can be said of the other Framers and Ratifiers of the Bill of Rights who remained active in public affairs during the late 18th and early 19th centuries. The adoption of the early exemptions without controversy, in others words, strongly suggests that they were not thought incompatible with constitutional prohibitions against involvements of church and state.

The exemptions have continued uninterrupted to the present day. They are in force in all 50 States. No judicial decision, state or federal, has ever held that they violate the Establishment Clause. In 1886, for example, this Court in *Gibbons* v. *District of Columbia*, 116 U. S. 404, rejected on statutory grounds a church's claim for the exemption of certain of its land under congressional statutes exempting Washington churches and appurtenant ground from real property taxes. But the Court gave not the slightest hint that it ruled against the church because, under the First Amendment, *any* exemption would have been unconstitutional. To the contrary, the Court's opinion implied that nothing in the Amendment precludes exemption of church property: "We are not disposed to deny that grounds left open around a church, not merely to admit light and air, but also used to add to its beauty and attractiveness, may, if not used or

intended to be used for any other purpose, be exempt from taxation under these statutes." *Id.*, at 407.[6]

Mr. Justice Holmes said that "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ." *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31 (1922). For almost 200 years the view expressed in the actions of legislatures and courts has been that tax exemptions for churches do not threaten "those consequences which the Framers deeply feared" or "tend to promote the type of interdependence between religion and state which the First Amendment was designed to prevent." 374 U. S., at 236. An examination both of the governmental purposes for granting the exemptions and of the type of church-state relationship that has resulted from their existence makes clear that no "strong case" exists for holding unconstitutional this historic practice.[7]

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[6] See also, *e. g.*, *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232, 237 (1890), where the Court stated: "The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions." Indeed, the Court seems always to have viewed attacks upon the constitutionality of the exemptions as wholly frivolous. See, *e. g.*, *Lundberg* v. *County of Alameda*, 46 Cal. 2d 644, 298 P. 2d 1, app. dismissed, 352 U. S. 921 (1956); *General Finance Corp.* v. *Archetto*, 93 R. I. 392, 176 A. 2d 73 (1961), app. dismissed, 369 U. S. 423 (1962).

[7] Compare the very different situation regarding prayers in public schools. The practice was not widespread at the time of the adoption of the First Amendment. Legislative authorization for the prayers came much later and then only in a relatively small number of States. Moreover, courts began to question the constitutionality of the practice by the late 19th century. The prayers were found unconstitutional by courts in six States and by state attorneys general in several others. See 374 U. S., at 270, 274–275.

II

Government has two basic secular purposes for granting real property tax exemptions to religious organizations.[8] First, these organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community. See, for example, 1938 N. Y. Constitutional Convention, Report of the Committee on Taxation, Doc. No. 2, at 2. Thus, New York exempts "[r]eal property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, library, patriotic, historical or cemetery purposes, for the enforcement of laws relating to children or animals, or for two or more such purposes . . . ." N. Y. Real Property Tax Law § 420 (1) (McKinney 1960).

Appellant seeks to avoid the force of this secular purpose of the exemptions by limiting his challenge to

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[8] The only governmental purposes germane to the present inquiry, of course, are those which now exist. As I said in *Schempp*, "[i]n the *Sunday Law Cases*, we found in state laws compelling a uniform day of rest from worldly labor no violation of the Establishment Clause . . . . The basic ground for our decision was that, granted the Sunday Laws were first enacted for religious ends, they were continued in force for reasons wholly secular, namely, to provide a universal day of rest and ensure the health and tranquility of the community. In other words, government may originally have decreed a Sunday day of rest for the impermissible purpose of supporting religion but abandoned that purpose and retained the laws for the permissible purpose of furthering overwhelmingly secular ends." 374 U. S., at 263–264.

"exemptions from real property taxation to religious organizations on real property used exclusively for religious purposes." Appellant assumes, apparently, that church-owned property is used for exclusively religious purposes if it does not house a hospital, orphanage, weekday school or the like. Any assumption that a church building itelf is used for exclusively religious activities, however, rests on a simplistic view of ordinary church operations. As the appellee's brief cogently observes, "the public welfare activities and the sectarian activities of religious institutions are . . . intertwined . . . . Often a particular church will use the same personnel, facilities and source of funds to carry out both its secular and religious activities." Thus, the same people who gather in church facilities for religious worship and study may return to these facilities to participate in Boy Scout activities, to promote antipoverty causes, to discuss public issues, or to listen to chamber music. Accordingly, the funds used to maintain the facilities as a place for religious worship and study also maintain them as a place for secular activities beneficial to the community as a whole. Even during formal worship services, churches frequently collect the funds used to finance their secular operations and make decisions regarding their nature.

Second, government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, nonprofit groups which receive tax exemptions, for each group contributes to the diversity of association, viewpoint and enterprise essential to a vigorous, pluralistic society. See *Washington Ethical Society* v. *District of Columbia,* 249 F. 2d 127, 129 (C. A. D. C. Cir. 1957). To this end, New York extends its exemptions not only to re-

ligious and social service organizations but also to scientific, literary, bar, library, patriotic and historical groups, and generally to institutions "organized exclusively for the moral or mental improvement of men and women." The very breadth of this scheme of exemptions negates any suggestion that the State intends to single out religious organizations for special preference. The scheme is not designed to inject any religious activity into a nonreligious context, as was the case with school prayers. No particular activity of a religious organization—for example, the propagation of its beliefs—is specially promoted by the exemptions. They merely facilitate the existence of a broad range of private, nonprofit organizations, among them religious groups, by leaving each free to come into existence, then to flourish or wither, without being burdened by real property taxes.

III

Although governmental purposes for granting religious exemptions may be wholly secular, exemptions can nonetheless violate the Establishment Clause if they result in extensive state involvement with religion. Accordingly, those who urge the exemptions' unconstitutionality argue that exemptions are the equivalent of governmental subsidy of churches. General subsidies of religious activities would, of course, constitute impermissible state involvement with religion.

Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance,[9] they do so in fundamentally different ways.

[9] In certain circumstances, of course, the economic value of a subsidy exceeds that of an exemption. If the only state assistance received by a religious organization is a real property tax exemption, the church must raise privately every cent which it spends. If, on the other hand, the only state aid to a church is a general subsidy, the church is relieved of the need to support itself to the extent that

A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer.[10] It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, "[i]n the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches," while "[i]n the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by churches through voluntary contributions." Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, 81 Harv. L. Rev. 513, 553 (1968). Thus, "the symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church." Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1687, n. 16 (1969). Tax exemptions, accordingly, constitute mere passive state in-

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its subsidy payments from the State exceed its tax payments to the State. Thus, to take the extreme case, a lightly taxed religious organization which received a large, general subsidy could purchase property, construct buildings and maintain its program wholly at public expense. Such dependence on state support is impossible when the only aid provided is a real property tax exemption.

[10] A real property tax exemption cannot be viewed as the free provision by the state of certain basic services—fire, police, water, and the like. As the Court, *ante*, at —, points out, "the fire and police protection received by houses of religious worship are no more than incidental benefits accorded all persons or institutions within the State's boundaries, along with many other exempt organizations. The appellant has not established even an arguable quantitative correlation between the payment of an ad valorem property tax and the receipt of these municipal benefits." See generally Bittker, Churches, Taxes and the Constitution, 78 Yale L. J. 1285, 1304–1310 (1969).

volvement with religion and not the affirmative involvement characteristic of outright governmental subsidy.[11]

Even though exemptions produce only passive state involvement with religion, nonetheless some argue that their termination would be desirable as a means of reducing the level of church-state contact. But it cannot realistically be said that termination of religious tax exemptions would quantitatively lessen the extent of state involvement with religion. Appellee contends that "[a]s a practical matter, the public welfare activities and the sectarian activities of religious institutions are so intertwined that they cannot be separated for the purpose of determining eligibility for tax exemptions." If not impossible, the separation would certainly involve extensive state investigation into church operations and finances. Moreover, the termination of exemptions would give rise, as the Court says, to the necessity for "tax valuation of church property, tax liens, tax foreclosures and the direct confrontations and conflicts which follow in the train of those legal processes." *Ante*, at —. Taxation, further, would bear unequally on different churches, having its most disruptive effect on those with the least ability to meet the annual levies assessed against them. And taxation would surely influence the allocation of church resources. By diverting funds otherwise available for religious or public service purposes to the support of the Government, taxation would necessarily affect the extent of church support for the enterprises which they now promote. In many instances, the public service activities would bear the brunt of the reallocation, as churches looked first to maintain their places and programs of worship. In short, the cessation of exemptions would have a significant impact on religious organizations. Whether Government grants

[11] See also, *e. g.*, Bittker, *supra* n. 10, at 1285–1304.

or withholds the exemptions, it is going to be involved with religion.[12]

IV

Against the background of this survey of the history, purpose and operation of religious tax exemptions, I must conclude that the exemptions do not "serve the essentially religious activities of religious institutions." Their principal effect is to carry out secular purposes—the encouragement of public service activities and of a pluralistic society. During their ordinary operations, most churches engage in activities of a secular nature which benefit the community; and all churches by their existence contribute to the diversity of association, viewpoint, and enterprise so highly valued by all of us.

Nor do I find that the exemptions "employ the organs of government for essentially religious purposes." To the extent that the exemptions further secular ends, they do not advance "essentially religious purposes." To the extent that purely religious activities are benefited by the exemptions, the benefit is passive. Government does not affirmatively foster these activities by exempting religious organizations from taxes, as it would were it to subsidize them. The exemption simply leaves untouched that which adherents of the organization bring into being and maintain.

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[12] The state involvement with religion which would be occasioned by any cessation of exemptions might conflict with the demands of the Free Exercise Clause. Cf. *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440 (1969); *Maryland & Virginia Eldership of the Churches of God* v. *The Church of God at Sharpsburg, Inc.*, 396 U. S. 367, 368–370 (1970) (BRENNAN, J., concurring). It is unnecessary to reach any questions of free exercise in the present case, however. And while I believe that "hostility, not neutrality, would characterize the refusal to provide [the exemptions], I do not say that government *must* provide [them], or that the courts should intercede if it fails to do so." 374 U. S., at 299.

Finally, I do not think that the exemptions "use essentially religious means to serve governmental ends, where secular means would suffice." The means churches use to carry on their public service activities are not "essentially religious" in nature. They are the same means used by any purely secular organization—money, human time and skills, physical facilities. It is true that each church contributes to the pluralism of our society through its purely religious activities, but the state encourages these activities not because it champions religion *per se* but because it values religion among a variety of private, nonprofit enterprises which contribute to the diversity of the Nation. Viewed in this light, there is no nonreligious substitute for religion as an element in our societal mosaic, just as there is no nonliterary substitute for literary groups.

As I said in *Schempp*, the First Amendment does not invalidate "the propriety of certain tax . . . exemptions which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. . . . [R]eligious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups. There is no indication that taxing authorities have used such benefits in any way to subsidize worship or foster belief in God." 374 U. S., at 301.

SUPREME COURT OF THE UNITED STATES

No. 135.—October Term, 1969

Frederick Walz, Appellant,
v.
Tax Commission of the City of New York.

On Appeal from the Court of Appeals of the State of New York.

[May 4, 1970]

Opinion of Mr. Justice Harlan.

While I entirely subscribe to the result reached today and find myself in basic agreement with what The Chief Justice has written, I deem it appropriate, in view of the radiations of the issues involved, to state those considerations that are, for me, controlling in this case and lead me to conclude that New York's constitutional provision, as implemented by its real property law, does not offend the Establishment Clause. Preliminarily, I think it relevant to face up to the fact that it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application. What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.

I

Two requirements frequently articulated and applied in our cases for achieving this goal are "neutrality" and "voluntarism." *E. g.*, see *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 305 (1963) (concurring opinion of Mr. Justice Goldberg); *Engel* v. *Vitale*, 370 U. S. 421 (1962). These related and mutually reinforcing concepts are short-form for saying that the Government

must neither legislate to accord benefits that favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion. Mr. Justice Goldberg's concurring opinion in *Abington* which I joined set forth these principles: "The fullest realization of true religious liberty requires that Government neither engage in nor compel religious practices, that it effect no favortism among sects or between religion and that it work no deterrence of religious belief." 374 U. S., at 305. The Court's holding in *Torcaso* v. *Watkins*, 367 U. S. 488, 495, is to the same effect: the State cannot "constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can [it] aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." In the vast majority of cases the inquiry, albeit an elusive one, can end at this point. Neutrality and voluntarism stand as barriers against the most egregious and hence divisive kinds of state involvement in religious matters.

While these concepts are at the "core" of the religious clauses, they may not suffice by themselves to achieve in all cases the purposes of the First Amendment. As Professor Freund has only recently pointed out, Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680 (1969), governmental involvement, while neutral, may be so direct or in such degree as to engender a risk of politicizing religion. Thus, as the opinion of THE CHIEF JUSTICE notes, religious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded against. Although the very fact of neutrality may limit the intensity of involvement,

government participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation. See my concurring opinion in *Board of Education* v. *Allen,* 392 U. S. 236, 249 (1968), and the concurring opinion of Mr. Justice Goldberg in *Abington School Dist.* v. *Schempp, supra,* at 307.

II

This legislation neither encourages nor discourages participation in religious life and thus satisfies the voluntarism requirement of the First Amendment. Unlike the instances of school prayers, *Abington School Dist.* v. *Schempp, supra,* and *Engel* v. *Vitale, supra,* or "released time" programs, *Zorach* v. *Clausen,* 343 U. S. 306 (1952), and *McCollum* v. *Board of Educ.,* 333 U. S. 203 (1948), the State is not "utilizing the prestige, power, and influence" of a public institution to bring religion into the lives of citizens. 374 U. S., at 307 (Mr. Justice Goldberg, concurring).

The statute also satisfies the requirement of neutrality. Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the radius of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.

The statute that implements New York's constitutional provision for tax exemptions to religious organizations has defined a class of nontaxable entities whose common denominator is their nonprofit pursuit of activities devoted to cultural and moral improvement and the doing of "good works" by performing certain social services in the community that might otherwise have to be

assumed by government. Included are such broad and divergent groups as historical and literary societies and more generally associations "for the moral and mental improvement of men." The statute by its terms grants this exemption in furtherance of moral and intellectual diversity and would appear not to omit any organization that could be reasonably thought to contribute to that goal.

To the extent that religious institutions sponsor the secular activities that this legislation is designed to promote, it is consistent with neutrality to grant them an exemption just as other organizations devoting resources to these projects receive exemptions. I think, moreover, in the context of a statute so broad as the one before us, churches may properly receive an exemption even though they do not themselves sponsor the secular type activities mentioned in the statute but exist merely for the convenience of their interested members. As long as the breadth of exemption includes groups that pursue cultural and moral and spiritual improvement in multifarious secular ways, including, I would suppose, groups whose avowed tenets may be antitheological, atheistic and agnostic, I can see no lack of neutrality in extending the benefit of the exemption to organized religious groups.[1]

[1] While I would suppose most churches devote part of their resources to secular community projects and conventional charitable activities, it is a question of fact, a fact that would only be relevant if we had before us a statute framed more narrowly to include only "charities" or a limited class of organizations, and churches. In such a case, depending on the administration of the exemption, it might be that an exemption to religion would turn out to be improper. This would depend, I believe, on what activities the church in fact sponsored. It would also depend, I think, on whether or to what extent the exemption were accorded to secular social organizations, conceived to benefit their own membership but also engaged in incidental general philanthropic or cultural undertakings. It might also depend on whether, if church sponsored programs were

III

Whether the present exemption entails that degree of involvement with government that presents a threat of fragmentation along religious lines involves, for me, a more subtle question than deciding simply whether neutrality has been violated. Unlike the subsidy which my Brother DOUGLAS foresees as the next step down the road, tax exemptions to nonprofit organizations are an institution in themselves, so much so that they are, as THE CHIEF JUSTICE points out, expected and accepted as a matter of course. See Freund, Public Aid to Parochial Schools, *supra*. In the instant case noninvolvement is further assured by the neutrality and breadth of the exemption. In the context of an exemption so sweeping as the one before us here its administration need not entangle government in difficult classifications of what is or is not religious, for any organization—although not religious in a customary sense—would qualify under the pervasive rubric of a group dedicated to the moral and cultural improvement of men. Obviously the more discriminating and compli-

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not open to all without charge, the exemption were extended to private clubs and organizations promoting activities on a contributory basis. These would all be questions of fact to be determined by the revenue authorities and the courts. While such determinations necessarily involve government in the religious institutions, they do not offend the First Amendment. That an evaluation of the scope of charitable activities in proportion to doctrinal pursuits may be difficult, does not render it undue interference with religion, cf. *Presbyterian Church* v. *Mary Eliz. Blue Hull Church*, 393 U. S. 440 (1969), for it does not entail judicial inquiry into dogma and belief. Indeed, such an inquiry may be inescapable in the context of a statute of less breadth than the one before us.

I would hold the present exemption neutral because New York has created a general class so broad that it would be difficult to conclude that religious organizations cannot properly be included in it.

cated the basis of classification for an exemption—even a neutral one—the greater the potential for state involvement in evaluating the character of the organizations. Cf. *Presbyterian Church* v. *Mary Eliz. Blue Hull Church*, 393 U. S. 440 (1969).

I agree with my Brother DOUGLAS that exemptions do not differ from subsidies as an economic matter. Aside from the longstanding tradition behind exemptions there are other differences, however. Subsidies, unlike exemptions, must be passed on periodically and thus invite more political controversy than exemptions. Moreover, subsidies or direct aid, as a general rule, are granted on the basis of enumerated and more complicated qualifications and frequently involve the state in administration to a higher degree, though to be sure, this is not necessarily the case.

Whether subsidies or direct aid entail that degree of involvement that is prohibited by the Constitution is a question that must be reserved for a later case upon a record that fully develops all the pertinent considerations [2] such as the significance and character of subsidies in our political system and the role of the government in administering the subsidy in relation to the particular program aided. It may also be that the States, while bound to observe strict neutrality, should be freer to experiment with involvement—on a neutral basis—than the Federal Government. Cf. *e. g.*, my separate opinion in *Roth* v. *United States*, 354 U. S. 476, 496 (1957).

I recognize that for those who seek inflexible solutions this tripartite analysis provides little comfort. It is always possible to shrink from a first step lest the momentum will plunge the law into pitfalls that lie in

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[2] The dimension of the problem would also require consideration of what kind of pluralistic society is compatible with the political concepts and traditions embodied in our Constitution.

the trail ahead. I, for one, however, do not believe that a "slippery slope" is necessarily without a constitutional toehold. Like THE CHIEF JUSTICE I am of the view that it is the task of this tribunal to "draw distinctions, including fine ones, in the process of interpreting the Constitution." *Ante*, p. ——. The prospect of difficult questions of judgment in constitutional law should not be the basis for prohibiting legislative action that is constitutionally permissible. I think this one is, and on the foregoing premises join with the Court in upholding this New York statute.

SUPREME COURT OF THE UNITED STATES

No. 135.—October Term, 1969

Frederick Walz, Appellant, v. Tax Commission of the City of New York. } On Appeal from the Court of Appeals of the State of New York.

[May 4, 1970]

Mr. Justice Douglas, dissenting.

Petitioner is the owner of real property in New York and is a Christian. But he is not a member of any of the religious organizations, "rejecting them as hostile." The New York statute exempts from taxation real property "owned by a corporation or association organized exclusively for . . . religious . . . purposes" and used "exclusively for carrying out" such purpose.[1] Yet nonbelievers who own realty are taxed at the usual rate. The question in the case therefore is whether believers—organized in church groups—can be made exempt from real estate taxes, merely because they are believers, while nonbelievers, whether organized or not, must pay the real estate taxes.

My Brother Harlan says he "would suppose" that the tax exemption extends to "groups whose avowed tenets may be antitheological, atheistic and agnostic." *Ante*, at —. If it does, then the line between believers and nonbelievers has not been drawn. But, with all respect, there is not even a suggestion in the present record that the statute covers property used exclusively by organizations for "antitheological purposes," "atheistic purposes" or "agnostic purposes."

In *Torcaso* v. *Watkins*, 367 U. S. 488, where we held that a State could not bar an atheist from public office in light of the freedom of belief and religion guar-

[1] N. Y. Real Prop. Tax Law § 420 (1) (Supp. 1969–1970).

anteed by the First and Fourteenth Amendments. Neither the State nor the Federal Government, we said, "can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Id.*, at 495.

That principle should govern this case.

There is a line between what a State may do in encouraging "religious" activities, *Zorach* v. *Clauson*, 343 U. S. 306, and what a State may not do by using its resources to promote "religious" activities, *McCollum* v. *Board of Education*, 333 U. S. 203, or bestowing benefits because of them. Yet that line may not always be clear. Closing public schools on Sunday is in the former category; subsidizing churches, in my view, is in the latter. Indeed I would suppose that in common understanding one of the best ways to "establish" one or more religions is to subsidize them, which a tax exemption does. The State may not do that any more than it may prefer "those who believe in no religion over those who do believe." *Zorach* v. *Clauson*, *supra*, at 314.

In affirming this judgment the Court largely overlooks the revolution initiated by the adoption of the Fourteenth Amendment. That revolution involved the imposition of new and far-reaching constitutional restraints on the States. Nationalization of many civil liberties has been the consequence of the Fourteenth Amendment, reversing the historic position that the foundations of those liberties rested largely in state law.

The process of the "selective incorporation" of various provisions of the Bill of Rights into the Fourteenth Amendment, although often provoking lively disagreement at large as well as among the members of this Court, has been a steady one. It started in 1896 with

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U. S. 226, in which the Court held that the Fourteenth Amendment precluded a State from taking private property for public use without payment of just compensation, as provided in the Fifth Amendment. The first direct holding as to the incorporation of the First Amendment into the Fourteenth occurred in 1931 in *Stromberg* v. *California*, 283 U. S. 359, a case involving the right of free speech, although that holding in *Stromberg* had been foreshadowed in 1925 by the Court's opinion in *Gitlow* v. *New York*, 268 U. S. 652. As regards the religious guarantees of the First Amendment, the Free Exercise Clause was expressly deemed incorporated into the Fourteenth Amendment in 1940 in *Cantwell* v. *Connecticut*, 310 U. S. 296, although that holding had been foreshadowed in 1923 and 1934 by the Court's dicta in *Myer* v. *Nebraska*, 262 U. S. 390, 399, and *Hamilton* v. *Regents*, 293 U. S. 245, 262. The Establishment Clause was not incorporated in the Fourteenth Amendment until *Everson* v. *Board of Education*, 330 U. S. 1, was decided in 1947.

Those developments in the last 30 years have had unsettling effects. It was, for example, not until 1962 that state-sponsored, sectarian prayers were held to violate the Establishment Clause. *Engel* v. *Vitale*, 370 U. S. 421. That decision brought many protests, for the habit of putting one sect's prayer in public schools had long been practiced. Yet if the Catholics, controlling one school board, could put their prayer into one group of public schools, the Mormons, Baptists, Moslems, Presbyterians, and others could do the same, once they got control. And so the seeds of Establishment would grow and a secular institution would be used to serve a sectarian end.

Engel was as disruptive of traditional state practices as was *Stromberg*. Prior to *Stromberg*, a State could

arrest an unpopular person who made a rousing speech on the charge of disorderly conduct. Since *Stromberg*, that has been unconstitutional. And so the revolution occasioned by the Fourteenth Amendment has progressed as Article after Article in the Bill of Rights has been incorporated in it and made applicable to the States.

Hence the question in the present case makes irrelevant the "two centuries of uninterrupted freedom from taxation," referred to by the Court. *Ante*, at —. If history be our guide, then tax exemption of church property in this country is indeed highly suspect, as it arose in the early days when the church was an agency of the state. See Torpey, Judicial Doctrines of Religious Rights in America, p. 171 (1948). The question here, though, concerns the meaning of the Establishment Clause and the Free Exercise Clause made applicable to the States for only a few decades at best.

With all due respect the governing principle is not controlled by *Everson* v. *Board of Education*, *supra*. *Everson* involved the use of public funds to bus children to parochial as well as to public schools. Parochial schools teach religion; yet they are also educational institutions offering courses competitive with public schools. They prepare students for the professions and for activities in all walks of life. Education in the secular sense was combined with religious indoctrination at the parochial schools involved in *Everson*. Even so, the *Everson* decision was five to four and, though one of the five, I have since had grave doubts about it, because I have become convinced that grants to institutions teaching a sectarian creed violate the Establishment Clause. See *Engel* v. *Vitale*, *supra*, at 443–444.

This case, however, is quite different. Education is not involved. The financial support rendered here is to the church, the place of worship. A tax exemption is a subsidy. Is my Brother BRENNAN correct in saying that we would hold that state or federal grants to

churches, say, to construct the edifice itself would be unconstitutional? What is the difference between that kind of subsidy and the present subsidy?[2]

The problem takes us back where Madison was in 1784 and 1785 when he battled the *Assessment Bill*[3] in Virginia. That bill levied a tax for the support of Christian churches, leaving to each taxpayer the choice as to "what society of Christians" he wanted the tax paid; and absent such designation, the tax was to go for education. Even so, Madison was unrelenting in his opposition. As stated by Mr. Justice Rutledge:

> "The modified Assessment Bill passed second reading in December, 1784, and was all but enacted. Madison and his followers, however, maneuvered deferment of final consideration until November, 1785. And before the Assembly reconvened in the fall he issued his historic Memorial and Remonstrance." *Everson* v. *Board of Education*, *supra*, at 37 (dissenting opinion).

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[2] In the oral argument in *McCollum* v. *Board of Education*, 333 U. S. 203, the following colloquy took place between MR. JUSTICE BLACK and counsel, John L. Franklin:

"MR. JUSTICE BLACK. Do I understand you to take the position that if the State of Illinois wanted to contribute five million dollars a year to religion they could do so, so long as they provided the same to every faith?

"MR. FRANKLIN. Yes, and the State of Illinois does contribute five million dollars annually to religious faiths, equally, and more than five million dollars, and has during its entire history.

"MR. JUSTICE BLACK. How does it do it?

"MR. FRANKLIN. By tax exemptions specifically granted to religious organizations.

"MR. JUSTICE BLACK. Your position is that they could grant five million dollars a year to religion, if they wanted to, out of the taxpayer's money, so long as they treated all faiths the same?

"MR. FRANKLIN. Yes, Your Honor. That is our interpretation of the meaning of the first clause of the First Amendment." O'Neill, Religion and Education under the Constitution 225 (1949).

[3] See Appendix I to this dissent.

The *Remonstrance*[4] stirred up such a storm of popular protest that the Assessment Bill was defeated.[5]

The *Remonstrance* covers some aspects of the present subsidy, including Madison's protest in paragraph 3 to a requirement that any person be compelled to contribute even "three pence" to support a church. All men, he maintained in ¶ 4, enter society "on equal conditions" including the right to free exercise of religion:

> "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions."

Madison's assault on the *Assessment Bill* was in fact an assault based on both the concepts of "free exercise" and "establishment" of religion later entered into the First Amendment. Madison, whom we recently called "the leading architect of the religious clauses of the First Amendment," *Flast* v. *Cohen*, 392 U. S. 83, 103, was indeed their author and chief promoter.[6] As Mr. Justice Rutledge said:

> "All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force

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[4] See Appendix II to this dissent.

[5] See Eckenrode, Separation of Church and State in Virginia c. V (1910).

[6] 1 Annals of Congress 434, 729–731.

of Madison's life, thought and sponsorship. He epitomized the whole of that tradition in the Amendment's compact, but nonetheless comprehensive, phrasing." *Everson* v. *Board of Education, supra,* at 39.

The Court seeks to avoid this historic argument as to the meaning of "establishment" and "free exercise" by relying on the long practice of the States in granting the subsidies challenged here.

Certainly government may not lay a tax on either worshiping or preaching. In *Murdock* v. *Pennsylvania,* 319 U. S. 105, we ruled on a state license tax levied on religious colporteurs as a condition to pursuit of their activities. In holding the tax unconstitutional we said:

> "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44–45, and cases cited. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation." *Id.,* at 112.

Churches, like newspapers also enjoying First Amendment rights, have no constitutional immunity from all taxes. As we said in *Murdock:*

> "We do not mean to say that religious groups and the press are free from all financial burdens of government. See *Grosjean* v. *American Press Co.,*

297 U. S. 233, 250. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon." *Ibid.*

State aid to places of worship, whether in the form of direct grants, or tax exemption, takes us back to the *Assessment Bill* and the *Remonstrance*. The church *qua* church would not be entitled to that support from believers and from nonbelievers alike. Yet the church *qua* nonprofit, charitable institution is one of many that receives a form of subsidy through tax exemption. To be sure, the New York statute [7] does not single out the church for grant or favor. It includes churches in a long list of nonprofit organizations: for the moral or mental improvement of men and women (§ 420); for charitable, hospital, or educational purposes (*ibid.*); for playgrounds (*ibid.*); for scientific or literary objects (*ibid.*); for bar associations; for medical societies; for libraries (*ibid.*); for patriotic and historical purposes (*ibid.*); for cemeteries (*ibid*); for the enforcement of laws relating to children or animals (*ibid.*); for opera houses (§ 426), fraternal organizations (§ 428); for academies of music (§ 434); for veterans' organizations (§ 452); pharmaceutical societies (§ 472); and for dental societies (§ 474). While the beneficiaries cover a wide range, "atheistic," "agnostic," or "antitheological" groups do not seem to be included.

Churches perform some functions that the State would constitutionally be empowered to perform. I

[7] Note 1, *supra*.

refer to nonsectarian social welfare operations such as the care for orphaned children and the destitute and people who are sick. A tax exemption to agencies performing those functions would therefore be as constitutionally proper as the grant of direct subsidies to them. Under the First Amendment the State may not, however, provide worship if private groups fail to do so. As Mr. Justice Jackson said:

> "[A State] may socialize utilities and economic enterprises and make taxpayers' business out of what conventionally had been private business. It may make public business of individual welfare, health, education, entertainment or security. But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character. . . . That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom and which the Court is overlooking today." *Everson* v. *Board of Education, supra,* at 26 (dissenting opinion).

That is a major difference between churches on the one hand and the rest of the nonprofit organizations on the other. Government could provide or finance operas, hospitals, historical societies, and all the rest because they represent social welfare programs within the reach of the police power. In contrast, government may not provide or finance worship because of the Establishment Clause any more than it may single out "atheistic" or "agnostic" centers or groups and create or finance them.

The Brookings Institution, writing in 1933, before the application of the Establishment Clause of the First

Amendment to the States, said about tax exemptions of religious groups: [8]

> "Tax exemption, no matter what its form, is essentially a government grant or subsidy. Such grants would seem to be justified only if the purpose for which they are made is one for which the legislative body *would be equally willing to make* a direct appropriation from public funds equal to the amount of the exemption. This test would not be met except in the case where the exemption is granted to encourage certain activities of private interests, which, if not thus performed, would have to be assumed by the government at an expenditure at least as great as the value of the exemption."

Since 1947 when the Establishment Clause was made applicable to the States, that Report would have to state that the exemption would be justified only where "the legislative body *could make*" an appropriation for the cause.

On the record of this case, the church *qua* nonprofit, charitable organization is intertwined with the church *qua* church. A church may use the same facilities, resources, and personnel in carrying out both its secular and its sectarian activities. The two are unitary and on the present record have not been separated one from the other. The state has a public policy of encouraging private public welfare organizations, which it desires to encourage through tax exemption. Why may it not do so and include churches *qua* welfare organizations on a nondiscriminatory basis? That avoids, it is argued, a discrimination against churches and in a real sense maintains neutrality toward religion which the First Amend-

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[8] The Brookings Institution, Report on a Survey of Administration in Iowa: The Revenue System, p. 33 (1933).

ment was designed to foster. Welfare services, whether performed by churches or by nonreligious groups, may well serve the public welfare.

Whether a particular church seeking an exemption for its welfare work could constitutionally pass muster would depend on the special facts. The assumption is that the church is a purely private institution, promoting a sectarian cause. The creed, teaching, and beliefs of one may be undesirable or even repulsive to others. Its sectarian faith sets it apart from all others and makes it difficult to equate its constituency with the general public. The extent that its facilities are open to all may only indicate the nature of its proselytism. Yet though a church covers up its religious symbols in welfare work, its welfare activities may merely be a phase of sectarian activity. I have said enough to indicate the nature of this tax exemption problem.

Direct financial aid to churches or tax exemptions to the church *qua* church is not, in my view, even arguably permitted. Sectarian causes are certainly not antipublic and many would rate their own church or perhaps all churches as the highest form of welfare. The difficulty is that sectarian causes must remain in the private domain not subject to public control or subsidy. That seems to me to be the requirement of the Establishment Clause. As Edmond Cahn said:

> "In America, Madison submitted most astutely, the rights of conscience must be kept not only free but *equal* as well. And in view of the endless variations—not only among the numerous sects, but also among the organized activities they pursued and the relative emotional values they attached to their activities—how could any species of government assistance be considered genuinely equal from sect to sect? If, for example, a state should attempt to

subsidize all sectarian schools without discrimination, it would necessarily violate the principle of equality because certain sects felt impelled to conduct a large number of such schools, others few, others none.[9] How could the officers of government begin to measure the intangible factors that a true equality of treatment would involve, i. e., the relative intensity of religious attachment to parochial education that the respective groups required of their lay and clerical members? It would be presumptuous even to inquire. Thus, just as in matters of race our belated recognition of intangible factors has finally led us to the maxim 'separate therefore unequal,' so in matters of religion Madison's immediate recognition of intangible factors led us promptly to the maxim 'equal therefore separate.' Equality was out of the question without total separation." E. Cahn, Confronting Injustice 186–187 (1966).

The exemptions provided here insofar as welfare projects are concerned may have the ring of neutrality. But subsidies either through direct grant or tax exemption for sectarian causes, whether carried on by church *qua* church or by church *qua* welfare agency, must be treated differently, lest we in time allow the church *qua* church to be on the public payroll, which, I fear, is imminent.

As stated by my Brother BRENNAN in *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 259 (concurring opinion), "It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into

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[9] This inequality, some argue, is pronounced when it comes to aid to parochial schools now run mainly by the Catholic Church. See Cogdell, What Price Parochiaid? 68–70 (1970).

the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government."

Madison as President vetoed a bill incorporating the Protestant Episcopal Church in Alexandria, Virginia, as being a violation of the Establishment Clause. He said, *inter alia:* [10]

> ". . . the bill vests in the said incorporated church an authority to provide for the support of the poor and the education of poor children of the same, an authority which, being altogether superfluous if the provision is to be the result of pious charity, would be a precedent for giving to religious societies as such a legal agency in carrying into effect a public and civil duty."

He also vetoed a bill which reserved a parcel of federal land "for the use" of the Baptist Church, as violating the Establishment Clause.[11]

What Madison would have thought of the present state subsidy to churches—a tax exemption as distinguished from an outright grant—no one can say with certainty. The fact that Virginia early granted church tax exemptions cannot be credited to Madison. Certainly he seems to have been opposed. In his paper "Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments" he wrote: [12]

"Strongly guarded as is the separation between Religion & Govt in the Constitution of the United States the danger of encroachment by Ecclesiastical Bodies,

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[10] H. Misc. Doc., No. 210, Pt. 1, 53d Cong., 2d Sess., 489–490.
[11] *Id.*, at 490.
[12] 3 William & Mary Q., 3d series, 555 (1946).

may be illustrated by precedents already furnished in their short history." And he referred, *inter alia*, to the "attempt in Kentucky for example, where it was proposed to exempt Houses of Worship from taxes." From these three statements, Madison, it seems, opposed all state subsidies to churches. Cf. Robertson, Should Churches Be Taxed? 60–61 (1958).

We should adhere to what we said in *Torcaso* v. *Watkins*, *supra*, at 495, that neither a State nor the Federal Government "can constitutionally pass laws or impose requirements *which aid all religious as against nonbelievers*, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." (Emphasis added.)

Unless we adhere to that principle, we do not give full support either to the Free Exercise Clause or to the Establishment Clause.

If a church can be exempted from paying real estate taxes, why may not it be made exempt from paying special assessments? The benefits in the two cases differ only in degree; and the burden on nonbelievers is likewise no different in kind.[15]

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[13] See Zollman, Tax Exemptions of American Church Property, 14 Mich. L. Rev. 646, 655–656 (1916).

The New York Supreme Court in *In re Mayor*, 11 Johns. 84, 88, said:

"As the church property is not, nor is likely soon to be, either appropriated to renting or exposed to sale, but is devoted exclusively to religious purposes, the benefit resulting to it, by the improvement of *Nassau-street*, must be small in comparison with that of other property, and it, therefore, ought not to contribute in the like proportion. It may be considered, possibly, as benefited, by rendering the access to the churches more convenient, and the places more pleasant and salubrious, by the freer circulation of the air. This may have some influence on the pew rents, and the ground may become permanently more valuable. These, however, appear to be small and remote benefits to property so circumstanced; and to charge the churches equally with adjoining private property is un-

The religiously used real estate of the churches today constitutes a vast domain. See Larson & Lowell, The Churches: Their Riches, Revenues and Immunities (1969). Their assets total over $141 billion and their annual income at least $22 billion. *Id.*, at 232. And the extent to which they are feeding from the public trough in a variety of forms is alarming. *Id.*, c. 10.

We are advised that since 1968 at least five States have undertaken to give subsidies to parochial and other private schools [14]—Pennsylvania, Ohio, New York, Connecticut, and Rhode Island. And it is reported that under two federal Acts, the Act of April 11, 1965, 79 Stat. 27, and the Act of November 8, 1965, 79 Stat. 1219, *billions of dollars* have been granted to parochial and other private schools.

The federal grants to elementary and secondary schools under 79 Stat. 27 were made to the States which in turn made advances to elementary and secondary schools. Those amounts are not available.

But the federal grants to private institutions of higher education are revealed in Department of Health, Education, and Welfare, Digest of Educational Statistics p. 16 (1969). These show in billions of dollars the following: [15]

1965–66	$1.4 billion
1966–67	$1.6 billion
1967–68	$1.7 billion
1968–69	$1.9 billion
1969–70	$2.1 billion

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reasonable and extravagant; and on this point the report ought to be sent back to the commissioners for revival and correction."

[14] U. S. News & World Report, May 4, 1970, at 34.

[15] These totals include all types of federal aid—physical plants, dormitory construction, laboratories, libraries, lunch programs, fellowships and scholarships, etc.

Of the total federal outlays for education only two-fifths are for programs administered by the Office for Education, other parts of

It is an old, old problem. Madison adverted to it:[16]

> "Are there not already examples in the U. S. of ecclesiastical wealth equally beyond its object and the foresight of those who laid the foundation of it? In the U. S. there is a double motive for fixing limits in this case, because wealth may increase not only from additional gifts, but from exorbitant advances in the value of the primitive one. In grants of vacant lands, and of lands in the vicinity of growing towns & Cities the increase of value is often such as if foreseen, would essentially controul the liberality confirming them. The people of the U. S. owe their Independence & their liberty, to the wisdom of descrying in the minute tax of 3 pence on tea, the magnitude of the evil comprized in the precedent. Let them exert the same wisdom, in watching agst every evil lurking under plausible disguises, and growing up from small beginnings."[17]

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the Department of HEW accounts for one-fifth. The rest of the outlays are distributed among 24 federal departments and agencies, of which the largest shares are accounted for by the Department of Defense, the Veterans Administration, the National Science Foundation, and the Office of Economic Opportunity. U. S. Bureau of the Budget, Special Analyses No. I, Budget of the U. S., 1971, Pt. 2, 115 (Feb. 1970).

[16] 3 William & Mary Q. 3d series, *supra*, n. 12, at 557–558.

[17] In 1875 President Grant in his State of the Union Message referred to the vast amounts of untaxed church property:

"In 1850, I believe, the church property of the United States which paid no tax, municipal or State, amounted to about $83,000,000. In 1860 the amount had doubled; in 1875 it is about $1,000,000,000. By 1900, without check, it is safe to say this property will reach a sum exceeding $3,000,000,000. So vast a sum, receiving all the protection and benefits of Government without bearing its proportion of the burdens and expenses of the same, will not be looked upon acquiescently by those who have to pay the taxes. In a growing country, where real estate enhances so

If believers are entitled to public financial support, so are nonbelievers. A believer and nonbeliever under the present law are treated differently because of the articles of their faith. Believers are doubtless comforted that the cause of religion is being fostered by this legislation. Yet one of the mandates of the First Amendment is to promote a viable, pluralistic society and to keep government neutral, not only between sects but between believers and nonbelievers. The present involvement of government in religion may seem *de minimis*. But it is, I fear, a long step down the Establishment path. Perhaps I have been misinformed. But as I have read the Constitution and its philosophy, I gathered that independence was the price of liberty.

I conclude that this tax exemption is unconstitutional.

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rapidly with time, as in the United States, there is scarcely a limit to the wealth that may be acquired by corporations, religious or otherwise, if allowed to retain real estate without taxation. The contemplation of so vast a property as here alluded to without taxation may lead to sequestration, without constitutional authority and through blood.

"I would suggest the taxation of all property equally, whether church or corporation, exempting only the last resting-place of the dead and possibly, with proper restrictions, church edifices." 9 Messages and Papers of the Presidents 4288–4289 (1897).

APPENDIX I

Assessment Bill. The December 24, 1784 print reproduced in the dissenting opinion of Mr. Justice Rutledge in *Everson* v. *Board of Education,* 330 U. S. 1, 72–74:

"A Bill Establishing a Provision for Teachers of the Christian Religion

"Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge; and it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians;

"*Be it therefore enacted by the General Assembly,* That for the support of Christian teachers, . . . per centum on the amount, or . . . in the pound on the sum payable for tax on the property within this Commonwealth, is hereby assessed, and shall be paid by every person chargeable with the said tax at the time the same shall become due; and the Sheriffs of the several Counties shall have power to levy and collect the same in the same manner and under the like restrictions and limitations, as are or may be prescribed by the laws for raising the Revenues of this State.

"*And be it enacted,* That for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid,

keeping a distinct account thereof in his books. The Sheriff of every County, shall, on or before the —— day of . . . in every year, return to the Court, upon oath, two alphabetical lists of the payments to him made, distinguishing in columns opposite to the names of the persons who shall have paid the same, the society to which the money so paid was by them appropriated; and one column for the names where no appropriation shall be made. One of which lists, after being recorded in a book to be kept for that purpose, shall be filed by the Clerk in his office; the other shall by the Sheriff be fixed up in the Court-house, there to remain for the inspection of all concerned. And the Sheriff, after deducting five per centum for the collection, shall forthwith pay to such person or persons as shall be appointed to receive the same by the Vestry, Elders, or Directors, however denominated of each such society, the sum so stated to be due to that society; or in default thereof, upon the motion of such person or persons to the next or any succeeding Court, execution shall be awarded for the same against the Sheriff and his security, his and their executors or administrators; provided that ten days previous notice be given of such motion. And upon every such execution, the Officer serving the same shall proceed to immediate sale of the estate taken, and shall not accept of security for payment at the end of three months, nor to have the goods forthcoming at the day of sale; for his better direction wherein, the Clerk shall endorse upon every such execution that no security of any kind shall be taken.

"*And be it further enacted,* That the money to be raised by virtue of this Act, shall be by the Vestries, Elders, or Directors of each religious society, appropriated to a provision for a Minister or Teacher of the Gospel of their denomination, or the providing places

of divine worship, and to none other use whatsoever; except in the denominations of Quakers and Menonists, who may receive what is collected from their members, and place it in their general fund, to be disposed of in a manner which they shall think best calculated to promote their particular mode of worship.

"*And be it enacted,* That all sums which at the time of payment to the Sheriff or Collector may not be appropriated by the person paying the same, shall be accounted for with the Court in manner as by this Act is directed; and after deducting for his collection, the Sheriff shall pay the amount thereof (upon account certified by the Court to the Auditors of Public Accounts, and by them to the Treasurer) into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever.

"THIS Act shall commence, and be in force, from and after the day of . . . in the year . . . .

"*A Copy from the Engrossed Bill.*

"John Beckley, C. H. D."

APPENDIX II

Memorial and Remonstrance Against Religious Assessments, as reproduced in II The Writings of James Madison 183–191 (G. Hunt ed. 1901):

"We, the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled 'A Bill establishing a provision for Teachers of the Christian Religion,' and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State, to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

"1. Because we hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority;

much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.

"2. Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the coordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.

"3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in

the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

"4. Because, the bill violates that equality which ought to be the basis of every law, and which is more indispensible, in proportion as the validity or expediency of any law is more liable to be impeached. If 'all men are by nature equally free and independent,' all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an '*equal* title to the free exercise of Religion according to the dictates of conscience.' Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their religions unnecessary and unwarantable? Can their piety alone be intrusted with the care of public worship? Ought their Religions to be endowed above all others, with extraordinary priv-

ileges, by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations, to believe that they either covet pre-eminencies over their fellow citizens, or that they will be seduced by them, from the common opposition to the measure.

"5. Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation.

"6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only during the period of miraculous aid, but long after it had been left to its own evidence, and the ordinary care of Providence: Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.

"7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its

fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstitution, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive state in which its Teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have greatest weight, when for or when against their interest?

"8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If religion be not within [the] cognizance of Civil Government, how can its legal establishment be said to be necessary to civil Government? What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure & perpetuate it, needs them not. Such a government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his persons and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.

"9. Because the proposed establishment is a departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Reli-

gion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent may offer a more certain repose from his troubles.

"10. Because, it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration, by revoking the liberty which they now enjoy, would be the same species of folly which has dishonoured and depopulated flourishing kingdoms.

"11. Because, it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs, that equal and compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the

salutary effects of this system under our own eyes, we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruits of the threatened innovation. The very appearance of the Bill has transformed that 'Christian forbearance, love and charity,' which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded should this enemy to the public quiet be armed with the force of a law?

"12. Because, the policy of the bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift, ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of [revelation] from coming into the Region of it; and countenances, by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of levelling as far as possible, every obstacle to the victorious progress of truth, the Bill with an ignoble and unchristian timidity would circumscribe it, with a wall of defence, against the encroachments of error.

"13. Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case where it is deemed invalid and dangerous? and what may be the effect of so striking an example of impotency in the Government, on its general authority.

"14. Because a measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens: and no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured. 'The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly.' But the representation must be made equal, before the voice either of the Representatives or of the Counties, will be that of the people. Our hope is that neither of the former will, after due consideration, espouse the dangerous principle of the Bill. Should the event disappoint us, it will still leave us in full confidence, that a fair appeal to the latter will reverse the sentence against our liberties.

"15. Because, finally, 'the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience' is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the Declaration of those rights which pertain to the good people of Virginia, as the 'basis and foundation of Government,' it is enumerated with equal solemnity, or rather studied emphasis. Either then, we must say, that the will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say, that they may controul the freedom of the press, may abolish the trial by jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right to suffrage, and erect themselves into an independent and hereditary assembly; or we must say, that they have no authority

to enact into law the Bill under consideration. We the subscribers say, that the General Asembly of this Commonwealth have no such authority: And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his [blessing, may re]dound to their own praise, and may establish more firmly the liberties, the prosperity, and the Happiness of the Commonwealth."